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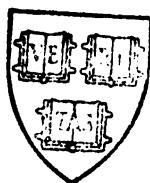
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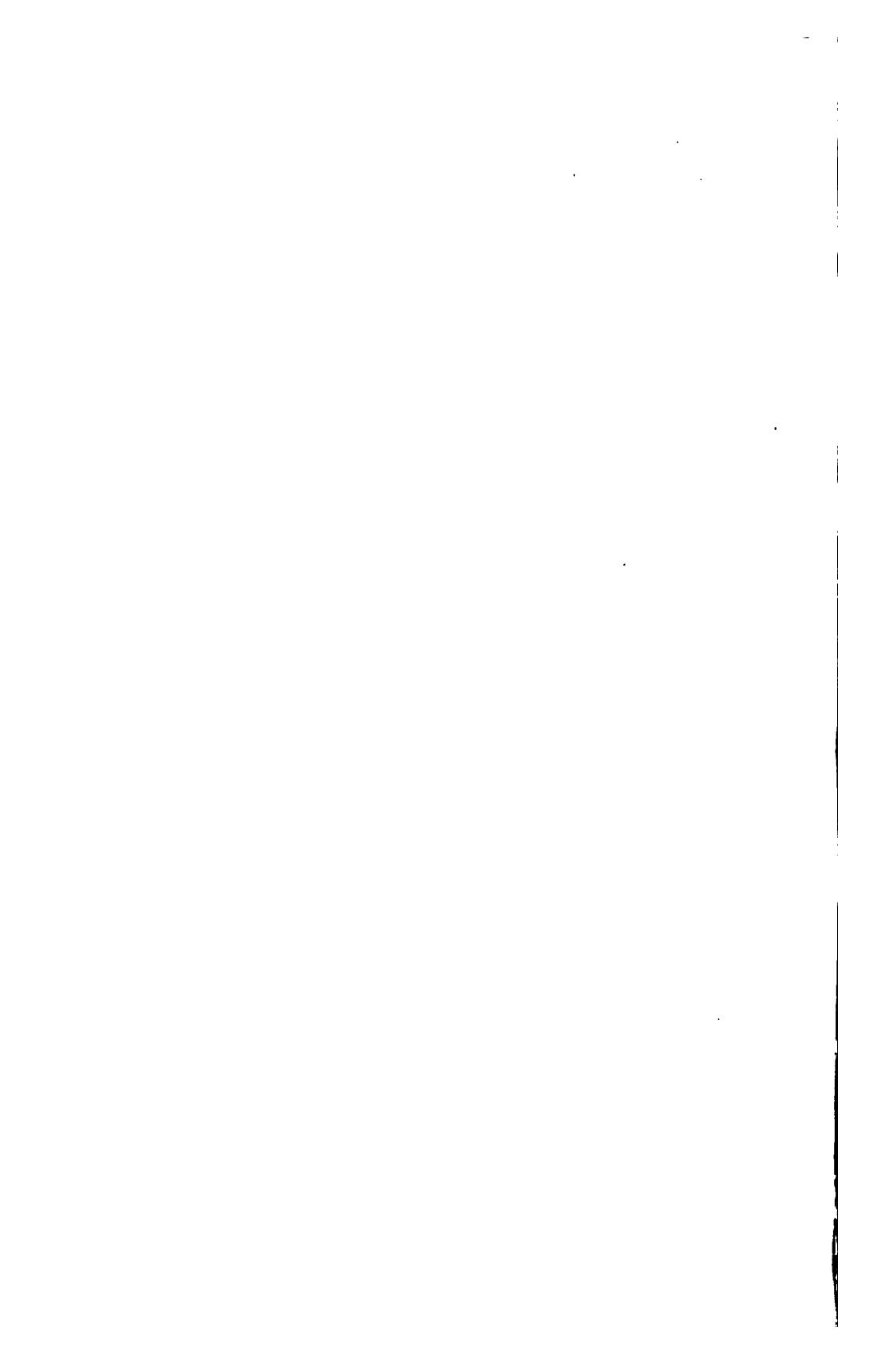
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July 1 7
REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS

AT THE MAY AND NOVEMBER TERMS, 1895, OF THE THIRD DISTRICT, AND
THE MARCH TERM, 1896, OF THE FIRST DISTRICT.

VOL. LXIV.

REPORTED BY
MARTIN L. NEWELL
OF THE SPRINGFIELD BAR

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THE
APPELLATE COURTS OF ILLINOIS

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

MARTIN L. NEWELL, Reporter, Springfield, Illinois.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—Thomas G. McElligott, Ashland Block.

JUSTICES.

JOSEPH E. GARY, Ashland Block, Chicago.

ARBA N. WATERMAN, " " "

HENRY M. SHEPARD, " " "

SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court, except Cook county.

Court sits at Ottawa, LaSalle county, on the third Tuesday in May, and the first Tuesday in December.

CLERK—Columbus C. Duffy, Ottawa, LaSalle county.

JUSTICES.

LYMAN LACEY, Havana, Mason county.

OLIVER A. HARKER, Carbondale, Jackson county.

JOHN D. CRABTREE, Oregon, Ogle county.

THIRD DISTRICT.

Composed of the Central Grand Division of the Supreme Court.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

CLERK—George W. Jones, Springfield, Sangamon county.

JUSTICES.

GEORGE W. PLEASANTS, Rock Island, Rock Island county.

GEORGE W. WALL, DuQuoin, Perry county.

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Composed of the Southern Grand Division of the Supreme Court.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in February and August.

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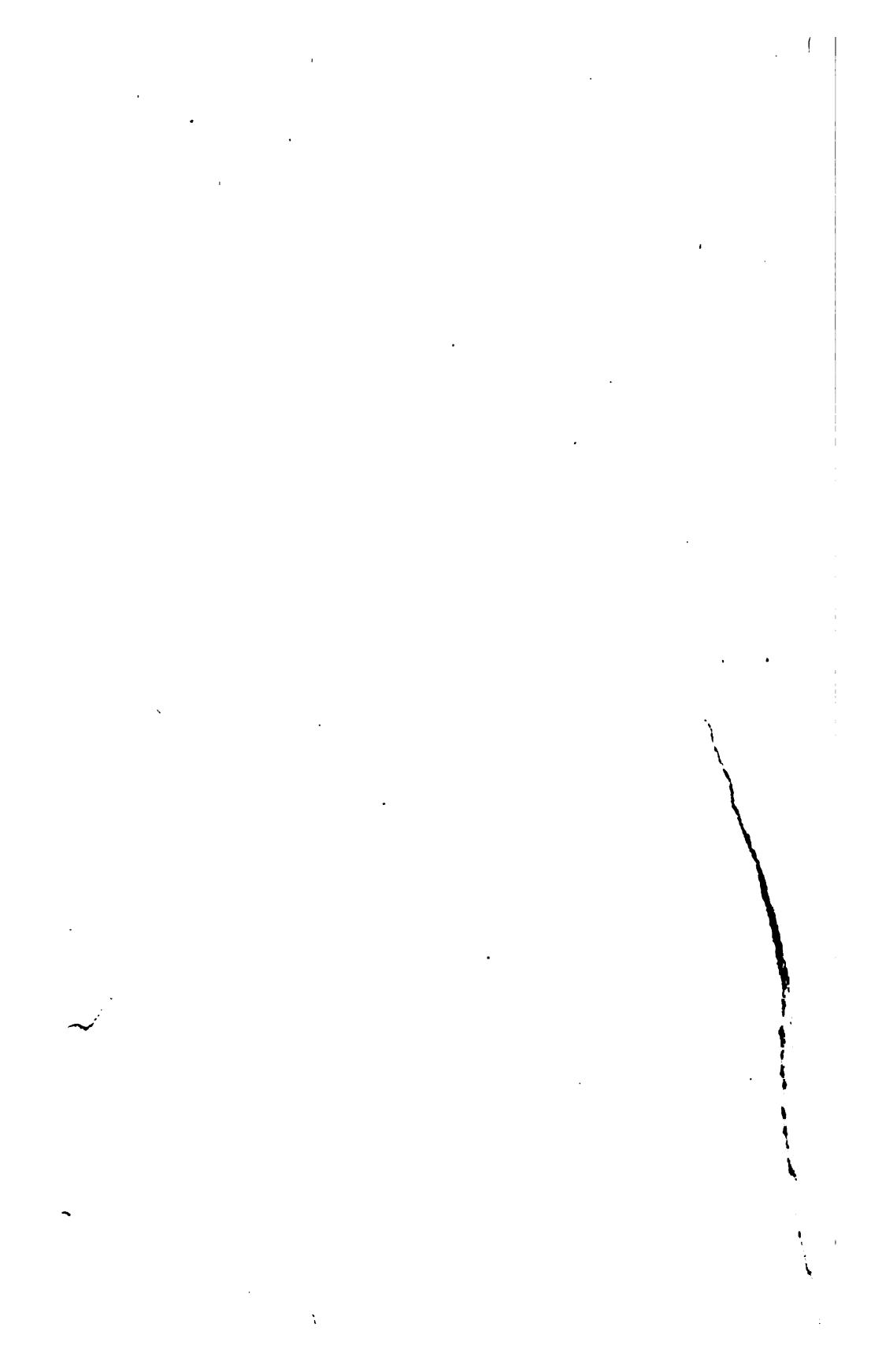


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CASES
IN THE
APPELLATE COURTS OF ILLINOIS

THIRD DISTRICT—MAY TERM, 1895.

Peter F. Wahl v. City of Nauvoo.

1. NOTICE—*Of Three Days, When Sufficient.*—Where an ordinance required a notice of three days to be given, a notice served on Saturday is sufficient for the Tuesday following.

2. STATUTES—*Repeal by Implication.*—The act of May 31, 1879, providing that the city council in all cities, and the president and board of trustees in all villages in this State, may, by ordinance, require every able-bodied male inhabitant of any such city or village, above the age of twenty-one years, and under the age of fifty years (excepting paupers etc.), to labor on the streets and alleys of any such city or village, not more than two days in each year, and providing for commutation of such labor at seventy-five cents per day, applies to all cities and villages whether organized under a special charter or under the general law.

Debt, for a penalty. Appeal from the Circuit Court of Hancock County; the Hon. CHARLES J. SCOFIELD, Judge, presiding. Heard in this court at the May term, 1895. Reversed. Opinion filed December 8, 1895.

MANIER, MILLER & WILLIAMS, attorneys for appellant.

A statute imposing a new penalty for an offense, is an implied repeal of so much of a prior statute as imposes a different penalty. *Sullivan v. People*, 15 Ill. 234. Section 3 of article 5 of appellee's charter, and the act of 1879, which applies to all cities and villages, are inconsistent with each other. Both can not stand, and the latter, by using the

term "all cities and villages," repeals the former and is the later expression of the legislative will; such a construction makes the law applicable to all citizens and of uniform operation. *Sup. McDonough Co. v. Campbell*, 42 Ill. 490; *Town of Ottawa v. Walker*, 21 Ill. 608-610; *Devine v. Cook Co.*, 84 Ill. 590.

A statute may be repealed without an express clause for that purpose; where two statutes are repugnant to each other in their provisions, the latest expression of the will of the legislature must prevail. *Muller v. People*, 31 Ill. 444; *Coates v. People*, 72 Ill. 304; *Dingman v. People*, 51 Ill. 277; *Aspern v. Lamar Ins. Co.*, 6 App. Ct. 238.

Where two grants of power, to a canal and a municipal corporation respectively, are repugnant, the last expressed will of the legislature must control. *Korah v. Ottawa*, 32 Ill. 122.

A subsequent statute, revising the whole subject of a former one, and intended as a substitute for it, although it contains no express words to that effect, operates as a repeal of the former. *Devine v. Cook Co.*, 84 Ill. 590.

Wm. D. HIBBARD, city attorney, for appellee; FRANK HALBOWER, of counsel.

Repeals by implication are never favored, and in the absence of an express repealing clause, it is only when two acts are so inconsistent with each other that both can not be executed, that the latter is considered as repealing the former. *Town of Ottawa v. La Salle County*, 12 Ill. 339; *Sedgwick on Construction of Statutes*, 97, 105, 113.

Where two statutes are seemingly repugnant, they are to be construed, if possible, so as to stand together. *Munson v. Crawford*, 65 Ill. 185; *Card v. McCaleb*, 69 Ill. 314; *Holton v. Daly*, 106 Ill. 131; *Hyde Park v. Oakwood Cem. Ass'n*, 119 Ill. 141.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This action was brought before the police magistrate of

Wahl v. City of Nauvoo.

the city of Nauvoo, against appellant, to recover the penalty for an alleged violation of section 3 of article 5 of the city charter and of ordinance No. 10, "providing for the improvement of streets and regulating street labor within the city," passed March 30, 1874, as amended in several particulars by ordinances passed subsequently. The violation alleged was his failure to labor on the streets or alleys or to make payment in lieu thereof as required by said charter and ordinance. On appeal from the judgment of the magistrate it was tried by the court without a jury, and judgment rendered against the defendant for \$2 debt, and the case is here on his appeal.

The city of Nauvoo is organized under a special charter, granted in 1869. 2 Pr. Laws of 1869, p. 101, Art. V, relates to "the city council and its legislative powers." Section 3 of that article is as follows:

"To require of, and it is hereby made the duty, of every male resident of the city, over the age of twenty-one years and under the age of sixty years, to labor not less than three days nor more than five days in each year, upon the streets, alleys and highways of the city; but any person may, at his option, pay in lieu of such labor such sum of money as may be provided by ordinance, not exceeding the rate of \$2 per day; provided, the sum shall be paid within three days after notice by the street supervisor is given to perform such street labor. In default of payment as aforesaid, and of the labor assessed, the sum of \$2 per day and cost shall be collected, and no set-off shall be allowed in any suit brought by the city to collect the same.

By Sec. 19, power is given to the city council to impose fines, forfeitures and penalties for the breach of any ordinance; and by Sec. 37 to make all ordinances which may be necessary and proper for carrying into effect the powers specified in the act.

The sections of ordinance No. 10, as amended, so far as they need to be here noticed, are as follows:

"Section 1. That every male inhabitant of the city of Nauvoo, between the ages of twenty-one and fifty years,

shall perform at least three days of street labor on the streets of the city of Nauvoo. Provided, however, that any person so liable to perform such street labor may commute the same by paying to the treasurer of the city the sum of \$1.50 for each day he is required to labor, who shall receipt therefor in the usual manner; and provided further, that any person chargeable with street labor shall be allowed to send in his place an able-bodied substitute to perform such labor in his behalf, which, when such labor is performed, shall release him from his liability.

Section 2. Such street labor shall be performed under the direction and supervision of the mayor or street commissioner, who shall call out and work all the street labor provided for in section 1 of this ordinance, between the 15th day of June and the 15th day of September of each year.

Section 3. It is hereby made the duty of the mayor or the superintendent of streets to notify each and every person liable to perform street labor, at least three days before the day set for such labor, which notice shall set forth the time and place and hour at which such person shall be present to perform such labor, and shall further notify said person what tool or implement he shall bring with him.

Section 4. Every person so notified as aforesaid, who shall neglect or fail to put in his appearance at the time and place indicated by such notice, shall forfeit and pay to the city of Nauvoo the sum of \$2 for each and every day in which he may be so delinquent."

The notice given to appellant was as follows:

"Duplicate. Poll tax notice. To Peter Wahl: You are hereby notified to appear at city tool house at city park, in the city of Nauvoo, county of Hancock, and State of Illinois, on the 22d day of August, A. D. 1893, at seven o'clock A. M., for the purpose of performing the street labor assessed against you by the city of Nauvoo. You may commute for said assessment by the payment of \$2 within three days from the service of this notice upon you.

Dated August 19, 1893.

JOHN F. HOHL,
Street Superintendent."

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It was served by Hohl on appellant by personal delivery, at about half past three o'clock in the afternoon of the day it was dated.

There was evidence tending to prove that appellant then was and for many years had been an inhabitant and resident of the city, over twenty-one and under fifty years of age, and that he did not attend as notified, nor perform any street labor for the year 1893, nor pay anything as commutation therefor, nor send any substitute.

From the sum mentioned in the notice as the amount for which he might commute, the court found it sufficient for only one day's labor, and rendered the judgment for only two dollars.

Objections were made, on specific grounds stated, to the evidence of Hohl's official character, of defendants' residence, and to the sufficiency of the notice, as not given "at least three days before the day set for such labor."

Section 6 of Ch. 100 of the Revised Statutes makes it the rule "in computing the time for which any notice is to be given, whether required by law, order of court or contract," that "the first day shall be excluded and the last included, unless the last day is Sunday, and then it shall be excluded." In this case it was given on Saturday, and for the following Tuesday. We are not prepared to say this was not such a notice as was prescribed.

The language of the ordinance is no stronger nor clearer than that of the statute which provides that if ten days shall not "intervene" between the time of suing out the summons and the next term of court, it shall be made returnable to the succeeding term, and if the declaration is not filed "ten days before" the court at which the process is made returnable the defendant may have a continuance. "Ten days" must be "at least ten days," and yet the suing out and filing at any hour on Friday of the week next before the one next preceding the court is sufficient. If, without the aid of the statutory rule for computation, you may include the first day of court, under these provisions of the practice act, why not in this case the day "set for such

labor," with the aid of that rule? It is certain that without including either the first or the last, ten days of any description, natural or artificial, can not "intervene" between the two indicated or elapse "before" the last. And yet, although they are not cases of notice to be given within the terms of the statutory rule, the word "before," used as in the ordinance, is construed as not excluding the last day, which is required in order to make the ten next after the first. But here is a case of notice required to be given, within the terms of that rule, and if it applies, it is conclusive. The cases referred to, in which an intervening Sunday is not counted, do not seem to be analogous.

A more serious question is presented by the objection made to the introduction of the ordinance, on the ground of a want of authority in the city council to make it.

Section 1 of the act approved May 31, 1879, entitled "An act providing for labor in the streets and alleys of all cities and villages in this State," enacts "that the city council in all cities and the president and board of trustees in all villages in this State may have power, by ordinance, to require every able-bodied male inhabitant of any such city or village, above the age of twenty-one years and under the age of fifty years (excepting paupers, idiots, lunatics and such others as are exempt by law), to labor on the streets and alleys of any such city or village, not more than two days in each year; but such ordinance shall provide for commutation of such labor at seventy-five cents per day."

Section 2 is that "any such city council or president and board of trustees of any such village shall have power, by ordinance, to provide such fines and penalties as may be necessary to enforce the provisions of this act." Session Laws of 1879, p. 79.

If this act applies to cities organized under special charters, it manifestly repeals section 3 of article 5 of the charter of the city of Nauvoo, and became substituted for it. They are inconsistent in respect to the persons who may be required to perform the labor provided for, the time for which they may be required to perform it, and the rate at

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which they may commute for it. These are the essential provisions of each. If stricken from the section of the charter, nothing would be left. It is manifest that the sections of ordinance No. 10 here in question were adopted under supposed authority of the charter, though as to the persons made liable to perform the labor it conforms to the act of 1879.

The only question, then, is whether that act applies to the city of Nauvoo; and that is a question of the intention of the legislature, its power to do so by a general law being undoubted. Art. 4, Sec. 22, of the Constitution.

That such was not its intention is matter of inference only, which counsel claim may be fairly drawn from the history of the legislation on this subject. This history in brief is, that by the general act of April 10, 1872 (R. S. Ch. 24), to provide for the incorporation of cities and villages, no provision was made for the assessment for street labor, and to supply that omission the act of April 10, 1875, authorized the city or village government "by ordinance to require every able-bodied male inhabitant of such city or village above the age of twenty-one years and under age of fifty years (excepting paupers, etc.) to labor on the streets and alleys of such city or village, not more than three days in each year, but such ordinance shall provide for commutation of such labor at not more than one dollar and fifty cents per day." This was amendatory of consecutive section 71 (Hurd's arrangement) of Ch. 24, under Art. 5, "of the powers of the city council," being Sec. 10 of that article, and conferring jurisdiction over waters, concluding with this new provision for street labor. Being thus amendatory of an existing section of the general law for the incorporation of cities and villages, it applied only to those organized under that law. Then followed the act of 1879, above quoted; and because it prescribed a shorter time for street labor and a less rate for commutation, it is said to show an intention to merely amend the amendatory act of 1875, and consequently to give it the same limited application.

We are of opinion that this inference is not warranted

but negatived by the title and body of the last act. It does not purport nor in any way appear intended to be an amendment of any existing statute, but an original, independent act, complete in itself, with nothing to hinder its application according to its terms, to "all the cities and villages in this State." Though it properly appears as sections 289 and 290 of chapter 24, because it relates to the cities and villages for the organization of which that chapter provides, it goes further and relates to all others in this State as well. As to the former, it necessarily repealed so much of section 71 amended by the act of 1875, as related to labor on streets and alleys, and provided a new and uniform rule on that subject for them and all others. In *Dalton v. Aurora*, 114 Ill. 138, this effect was given to the same language in the title and body of an act to provide for erecting and maintaining a system of water works, which was held to include cities organized under special charter, as well as those under the general law. The case seems fairly in point and conclusive of this. Its force is not weakened by the fact that the court found a further reason for the construction given. The plain, unambiguous terms of the act, "all cities, incorporated towns and villages in the State," was the ground of the unhesitating decision.

Section 3 of article 5 of the special charter having been thus abrogated, the ordinance as amended, not authorized by the act which took its place or any other grant of power to the city, was void. The judgment of the court below will therefore be reversed.

**Illinois Central Railroad Company v. Albert J. Schenk
and Charles Heath, partners as Schenk & Heath.**

1. **QUESTIONS OF FACT—Verdict Conclusive.**—In an action against a railroad company for setting fire to a building, the question as to where and from what source the fire originated, is one of fact for the determination of the jury.

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2. PARTIES—*Interest in Goods Destroyed by Fire.*—Where a person holds goods on commission at his own risk, and is bound by his contract to return them in good order to his principal, or their equivalent in value, his interest in such goods is sufficient to entitle him to recover for their wrongful destruction or damage.

Trespass on the Case, for setting fires, etc. Appeal from the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed January 11, 1896.

WOLFE & SAVAGE, attorneys for appellant.

THOMAS J. SMITH and HARRY L. KELLY, attorneys for appellees.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

The judgment below was for plaintiffs there, appellees here, for \$4,000, for loss on buildings and contents by fire, alleged to have come from an engine of appellant through neglect to provide proper means for its prevention, or carelessness of its employes in handling said engine. The record is brought here by appeal for little reason assigned other than that the verdict was not supported by the evidence.

Appellees were dealers in agricultural implements, wagons, buggies, etc., at the village of Fisher, and carried on their business in four store rooms, fronting south on an east and west street, at the northeast corner, made by its intersection with another on the west running north and south. These rooms were side by side, constituting the main buildings. Joined to the rear or north end of the west building was a shed roof, sloping north and covering a room about seven feet high at the eaves, twenty feet long and twelve in width.

The railroad track running east and west through the village, at its nearest point was about seventy feet north of the shed. The station was about northwest from it. A light passenger train going east arrived at 4:50 o'clock p. m.

of July 4, 1894, the engine stopping a little west or north from the shed. It left at 5:00, and a few minutes thereafter the alarm was given and the usual efforts made to extinguish the fire and remove the stock. According to the evidence the buildings, which were entirely destroyed, were reasonably worth \$1,000, and the loss on the stock by destruction and damage \$3,951.50

The principal question of fact made was whether the fire was communicated by sparks from the engine—which included, circumstantially, the condition of the appliance for arresting them, and the management of the engine.

No witness pretended to have seen just how, when or where it started. The main rooms were separate, one story, frame buildings, which were either weather boarded or battened without, and tightly lined with strips of tin within, so that when closed, if there was no fire within, it was hardly possible for any to get in without burning its way. The shed room also was so battened and lined. It was a midsummer day. No fire was required in them for any purpose. It was a holiday and they were not opened for business. Appellant Schenk was in there for fifteen or twenty minutes about seven o'clock in the morning, and again in the office for ten minutes, about eight o'clock. Perhaps also they were open about one o'clock p. m., for not more than ten minutes, though the testimony is not clear on that point. But at least for four hours next before the fire they were unopened. It does not appear that they were exposed to any fire from without, unless from the engine. It stood a little west of north from the shed room when the train pulled out. A rather strong wind was blowing in the direction from it to the shed room, whose old shingled roof sloped toward it.

A farmer in the neighborhood, standing from twenty to thirty feet south of the engine, testified that when it started up the wheels slipped on the rails and sparks and balls of fire were thrown out, and continued to be thrown out from the smoke stack until it passed a warehouse east and a little north of appellees' buildings. After the train went out

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he started up town and when he got about opposite the depot—two or three minutes after he started—heard the alarm, turned and ran back and saw fire near the center of the shed roof. This was about five minutes after the engine had passed, and in fifteen the roof was all ablaze.

Another witness, who resided in Fisher, north of the depot, was going toward it and was about two hundred feet from it when the train started up. He remarked that they were pulling out rather lively; saw the engine; did not notice the wheels, but did notice that it was exhausting freely, as though it was pulled open to pull out lively, and that as near as he could judge, the throttle was thrown open; it was going exceedingly fast. He paid no particular attention to the train after it started up, but it seemed to him to pull out rapidly past appellees' buildings. Some twenty minutes later he heard the alarm and ran down to them and saw fire in only one place on the shed roof, but it spread rapidly right across the west building.

A third witness, who lived directly south and across the street from the burned warehouses, says he heard the train pull out and was annoyed more than usual by it.

The engine was what is called "a Weldon, old style," with a diamond stack, which a witness formerly employed by appellant as a wiper and hostler in the yards at Champaign, testified was a kind not now in general use nor a good kind to prevent or arrest sparks, for reasons stated, but he had no knowledge of its condition or how it was handled when the train pulled out on the occasion in question. He saw it arrive but did not see it leave.

On the other hand Mr. Jones, employed by appellant at its Rantoul repair shops to examine engines, boilers and smoke stacks, testified that he inspected this one on the day before the fire and again on the day after it, and found the engine and appliances "first class, everything all right;" that he knew of none better than those he described, or in more common use on the road, except as to the main line, about which he had no knowledge in this respect. On cross-examination he admitted it was not proper to throw open the throttle

to start an engine, and that if in good condition fire can not escape; if fire does escape it is not in good condition.

The engineer said he did not see that his engine threw fire when starting out of Fisher, and that the wheels did not slip; that the next station east was Dewey, distant three and a quarter miles from Fisher, and they had twenty-five minutes in which to make the run; that they started on time, at five o'clock, and at a speed of three or three and a half miles an hour. He thought the engine and its appliances were of a good kind and in good condition; had run it since November, 1893, and never known it to throw out sparks, though it might have done so without his knowing it; if it threw out sparks on that day it would have to be slipping on the rails, and if it was so moved out as to slip the wheels it was not properly managed. He had had no experience with a straight stack, and therefore, as to the comparative merits of that and the diamond, expressed no opinion, though he thought the diamond was as much used on the road as the straight.

The fireman corroborated him as to the distance to Dewey, the time card and the rate of speed at which they started from Fisher, but whether sparks were in fact thrown or the wheels slipped before starting or afterward, said nothing.

A locomotive engineer bearing the same surname with that of the one in charge of this engine, but then in the employ of the C., C., C. & St. L. R. R. Co., was of opinion that the diamond stack is as good as the straight for arresting sparks, described the process of treating sparks by each, and stated as a fact that on the C. & A. railroad the diamond was used recently.

Appellant's contention was that the fire in this case originated within and on the floor of the shed room, and some half dozen witnesses testified that there was where they first observed it and that they did not then observe any sign of it elsewhere; while twice as many swore they first observed it on the roof of the shed room and did not then see any sign of it elsewhere. The time, place and position at and from which they so respectively observed it were, of course, different;

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but these differences being considered, in connection with the other circumstances in proof mentioned, we think it clear that where and from what source it started were pure questions of fact for the determination of the jury, and their finding upon these questions was supported by a preponderance of the evidence; and in that case are further of opinion that it was chargeable to the negligence of appellant, if not in respect to the provision of the means of preventing it, in that of its agents in the use of these means.

It is not questioned that damage was done to the full amount found. It appears, however, that a portion of the stock was held under a commission contract, and it is therefore claimed that appellees could not rightfully recover for that. The contract was understood to have been burned in the fire, but the proof was that the goods were at the risk of appellees, who were bound to return them in good order or their equivalent in value, and were not bound to insure them. After the fire they paid for them. We think their interest in them was such as entitled them to recover for their wrongful destruction or damage.

The court admitted evidence of the rental value of the buildings, and instructed the jury to allow it for the time required to replace them or obtain others for their business, which is urged as error.

We deem it unnecessary to pass upon the propriety of these rulings, because we find in the record no sufficient warrant for a presumption that the jury considered this item in their assessment. If there was any basis in the evidence for the allowance of any definite sum on that account it was comparatively trifling, and the whole amount found was very considerably less than the proof would have justified under the unquestioned rule for the measurement of the damages. The error, if such it was, did no harm. In our opinion the judgment was right and will therefore be affirmed.

64 30
164 458

Home Insurance Company v. J. A. Mendenhall.

1. INSURANCE—*What is an Insurable Interest.*—A person who has entire possession of property, with the exclusive use and enjoyment of the same and a reasonable expectation of becoming the owner in fee, has an insurable interest therein.

2. SAME—*Nature of an Insurable Interest.*—It is not necessary that the assured should have either a legal or equitable interest, or indeed any property interest in the property insured. It is enough if he holds such a relation to it that its destruction by the peril insured against, involves pecuniary loss to him, or those for whom he acts. It need not be an existing *jus in re* nor *jus ad rem*, or interest vested; it is sufficient if it exists at the time of the insurance and loss, although contingent and liable never to attach or be perfected by occupancy or possession.

3. SAME—*Nature of the Contract.*—The contract of insurance is applicable to protect persons against uncertain events which may in any wise be a disadvantage to them; not only those persons to whom positive loss may arise by such events occasioning the deprivation of that which they may possess, but those also, who, in consequence of such events, may have intercepted from them the advantage or profit which, but for such events, they would acquire, according to the ordinary and probable course of things.

4. SAME—*Who has an Insurable Interest.*—Any person has an insurable interest in property, by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has any title in, or lien upon, or possession of, the property itself.

5. SAME—*Vacant Premises.*—A building was occupied by a tenant whose term was to expire March 1st, and the owner had rented it to another tenant, who was ready to enter. The old tenant held over until March 2d, and the next day the new tenant went to the building and did some cleaning; on the 5th he placed some of his furniture in the house, put up a stove and made a fire therein, but, by reason of rain did not complete his moving that day. The night following the building burned. It was held that there was no such vacancy as vitiated the policy of insurance upon it.

6. SAME—*False Statements in Proofs of Loss.*—A false statement in proofs of loss made out by the adjuster and sworn to by the insured, concerning the title of the property insured, does not vitiate the policy where such statement arises from the negligence of the insured in not reading such proofs and there is no attempt or intention on his part to commit a fraud upon the insurer.

Assumpsit, on policy of insurance. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

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Heard in this court at the May term, 1895. Affirmed. Opinion filed February 8, 1896.

Propositions of law presented by the defendant below:

(1.) That under the evidence the plaintiff had no insurable interest in the premises in controversy at the time the policy sued on was issued. Refused.

(2.) That under the evidence the said building in controversy had become vacant without notice to and without the consent of the defendant in writing when the loss occurred. Refused, but held building not vacant within the meaning of the terms of the policy.

(3.) That under the evidence the building in controversy had become unoccupied without notice to and without the consent of the defendant in writing when the loss occurred. Refused, but held the building not unoccupied within the meaning of the terms of the policy.

(4.) That the interest of the plaintiff in the property insured, whether as owner or trustee, consignee, factor, agent, mortgagee, lessee or otherwise was not truly stated in the policy. Held.

(5.) That the interest of the plaintiff in the property insured was not the entire, unconditional and sole ownership of the said property for the use and benefit of the plaintiff, and the interest of the plaintiff was not represented to the defendant and so expressed in the written part of said policy. Held, but also held that the interest of the plaintiff as it actually existed was fully disclosed and represented to the defendant before the policy was issued.

(6.) That the interest of the plaintiff in the property insured was not truly stated in said policy. Held.

(7.) That the plaintiff committed a fraud upon the defendant by falsely swearing, on the 9th day of December, 1889, before one T. C. Richardson, a notary public of the county of Sangamon, State of Illinois, that he, the plaintiff, was the owner in fee simple of a certain other building insured under said policy, which was destroyed by fire on the 30th day of November, A. D. 1889, whereby the plaintiff obtained from the defendant the sum of \$1,556.88. Refused.

(8.) That under the plea of set-off and the evidence, the defendant is entitled to recover the sum of \$1,556.88 paid to the plaintiff by the defendant under said policy, on account of the loss of the building destroyed by fire on the 30th day of November, A. D. 1889. Refused.

(9.) That the law of this case is with the defendant on the policy sued on. Refused.

(10.) That the law under the plea of set-off is with the defendant. Refused.

PATTON, HAMILTON & PATTON, attorneys for appellant.

CONNOLLY & MATHER, attorneys for appellee.

OPINION PER CURIAM.

This is an appeal from a judgment for \$1,500, upon a policy of insurance against fire.

To the declaration, which is in the usual form, the defendant pleaded the general issue and five special pleas. The first of these latter alleged that the building was vacant or unoccupied, contrary to the terms of the policy; the second set up a clause in the policy whereby a forfeiture was declared in case the interest of the assured was not truly set out in the policy; the third set up a clause declaring a forfeiture in case the interest of the assured was other than that of unconditional and sole ownership; the fourth set up a clause forfeiting the policy in case of fraud or false swearing and alleged that the plaintiff swore falsely in making proofs of loss on the occasion of a previous fire by which another building, included in the policy, had been destroyed; and the fifth was a formal plea of set-off under which the defendant proposed to recover back the money paid to the plaintiff on the former loss because of the alleged false swearing in making the proofs, as averred in the fourth plea. Replications were filed, and the issues were submitted to the court, a jury being waived. The court found for the plaintiff and entered judgment accordingly, from which this appeal is prosecuted by the defendant.

It is argued in the appellant's brief, first, that the appellee had no insurable interest at the time of the issuance of the policy.

It appears from the evidence that the plaintiff was at the time he made the application in possession and control of the property; that he then resided upon an adjacent tract of land which had also been placed in his possession and control by his father, who held the legal title. The father, desiring that the plaintiff should have as much land as his other son, had bought the property in question at a master's sale a few days before the application was made, and though he had not then received a deed from the master he caused the plaintiff to be then possessed. That possession continued thereafter, it being the understanding between the

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father and plaintiff that the latter was to have the property. The father so provided in his will, which was made, as the evidence tends to show, previous to this application.

At any rate it was settled that this land as well as the other tract was to be the plaintiff's, and he had full control of the same, and treated it as though he had the absolute title thereto. The facts as to his interest were stated to the agent through whom the insurance was effected and he was not misled as to the condition of the title.

The plaintiff had entire possession with the exclusive use and enjoyment and a reasonable expectation of becoming the owner in fee.

This very clearly gave him an insurable interest. It is said in *Wood on Insurance*, Sec. 266: "It is not necessary that the insured should have either a legal or equitable interest, or indeed any property interest in the subject-matter insured. It is enough if he holds such a relation to the property that its destruction by the peril insured against involves pecuniary loss to him or those for whom he acts. It need not be an existing *jus in re* nor *jus ad rem*."

Again, in section 268, the same author says the interest need not be vested. It is sufficient if it exists at the time of the insurance and loss, though contingent, and liable never to attach or be perfected by occupancy or possession, and, quoting from a leading case, he adds that "the contract of insurance is applicable to protect men against uncertain events which may in any wise be of disadvantage to them; not only those persons to whom positive loss may arise by such events occasioning the deprivation of that which they may possess, but those also, who, in consequence of such events, may have intercepted from them the advantage or profit which, but for such events, they would acquire, according to the ordinary and probable course of things."

In the language of Mr. Justice Gray in the case of *R. R. Co. v. Ins. Co.*, 98 Mass. 423:

"By the law of insurance, any person has an insurable interest in property, by the existence of which he receives a

benefit, or by the destruction of which he will suffer a loss, whether he has any title in, or lien upon, or possession of the property itself."

Further citation upon this point need not be made. The finding of the court that the plaintiff had an insurable interest is very clearly supported by the proof.

It is next argued in the brief that the appellee violated the condition in reference to vacancy, and for this reason the judgment should be reversed. The building was occupied by a tenant whose term was to expire on March 1st, and the plaintiff had rented it to another tenant who was ready to enter. The old tenant held over until Friday P. M., March 2d. The next day the new tenant went to the house and did some cleaning, and on Monday he placed some of his furniture in the house, put up a stove, and made a fire therein, but by reason of rain did not complete his move that day. That night the fire occurred.

We think there was no vacancy here such as should vitiate the insurance.

Such a clause must have a fair and reasonable construction, and as we regard it, there was, practically speaking, no vacancy.

It is argued by appellee that the forfeiture can not be insisted upon unless the vacancy (if any) was from some cause "within the control of the assured."

The entire clause reads as follows:

"Or if the above mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied without notice to, or consent of, this company, in writing, or the risk shall be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured, without the assent of this company indorsed hereon, * * * then, and in every such case, this policy shall be void."

Counsel for appellee cite Am. Cen. Ins. Co. v. Cleary, 28 Ill. App. 195, and N. A. F. Ins. Co. v. Zaenger, 63 Ill. 464, in support of his position that the phrase "or by any means whatever within the control of the assured" applies as well

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to the provision against vacancy as to the other matters mentioned.

The clauses construed in those cases are very much like the one involved here—so much so that it is difficult to distinguish them from this, or to say that the construction there adopted should not prevail here.

If the present clause is to be so read, then this branch of the case is perfectly clear, as it is evident from the proof that the plaintiff was in no manner at fault for the situation of the property which the defendant characterizes as a vacancy. The outgoing tenant, by his delay and by his mode of proceeding, made it impossible for the new tenant to move in sooner.

But, as already stated, regardless of this question of construction, we are inclined to hold there was no vacancy, within the meaning of the policy, fairly and reasonably construed as it should be.

The point thirdly and lastly urged in the brief of appellant is that the plaintiff, in making proofs of loss as to the fire which occurred more than four years before that which caused the present loss, falsely swore that the building then destroyed belonged to him in fee simple, and therefore, under a provision of the policy that "all fraud or attempt at fraud by false swearing or otherwise shall cause a forfeiture of all claim on this company under this policy," the plaintiff was barred of recovery.

It appears that the proofs of loss upon which this defense is predicated were prepared by the adjuster, who knew the condition of the title, and the evidence strongly tends to show that the plaintiff, although he signed and swore to the document, which was very lengthy, did not know that it contained the statement in question.

He understood that the nature of his interest was well known when the insurance was effected, and he had no reason to suppose that it was necessary to make a further statement in regard to it.

He testified that when the adjuster was preparing the proofs of loss the latter inquired whether he had a deed to the land, to which he answered that the title was in his

father, and that it was so understood by the agent who took the risk, and the adjuster said that was all right.

In this the plaintiff is directly corroborated by two witnesses, who were present and claim to have heard the conversation.

This is denied by the adjuster.

Admitting that the plaintiff was negligent in not reading and fully comprehending all that was in the proof of loss before he signed it, still there is no reason to believe that he intended or attempted to commit a fraud upon the company. Nor indeed was any such fraud committed.

This objection is, as we think, without any sufficient foundation.

The defendant submitted ten propositions to the court and asked for its ruling thereon.

Some of these were held and some refused. We think none of them was a proposition of law, properly considered. All of them, more or less, involved questions of fact—and to some of them the court added a notation expressing the view entertained upon the point involved.

We are of the opinion that the court was fully warranted in its general conclusion as to the rights of the parties and in the special rulings upon these propositions.

The judgment is right on the merits and it must be affirmed.

Philip J. Keller v. Emerson Rhodes.

1. **BILL OF SALE—What Passes.**—A bill of sale of an entire stock of goods contained in a building named, together with the fixtures and furniture therein, is sufficient to pass the title to the fire proof safe used in the store.

Replevin.—Appeal from the County Court of Moultrie County; the Hon. J. D. PURVIS, Judge, presiding. Heard in this court at the November term, 1895. Reversed and remanded. Opinion filed December 6, 1895.

J. R. & WALTER EDEN, attorneys for appellant.

MEEKER & MEEKER, attorneys for appellee.

Keller v. Rhodes.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This was an action of replevin brought by appellee before a justice of the peace to recover a fire and burglar proof safe, said to be worth sixty-eight dollars. On appeal to the County Court plaintiff obtained judgment, and defendant, by further appeal, brings the case here.

Feeling bound to reverse this judgment on the facts proved, we proceed to state them as they appear from abundant and uncontradicted evidence.

On April 11, 1894, the stock of goods with the safe in controversy then in appellee's store at Sullivan, were in possession of the sheriff, under a chattel mortgage and several executions against him. In the afternoon of that day he executed to Edna F. Keller a bill of sale by which for the express consideration of \$1,300, including the amount of the liens mentioned, he sold and transferred to her "the following described goods and chattels, to wit: the entire stock of groceries, queens and glassware, tobaccos, cigars, candies, canned goods, flour, and in fact the entire stock of goods contained in the Titus building, known as the Opera House, on the north side of the public square in Sullivan, Illinois, together with the fixtures and furniture therein." This business was done with appellant, acting for and in the name of said Edna, his daughter. On the next morning he paid to the sheriff, for her, the full amount due on the mortgage and executions, with all the costs; and thereupon, in the presence of appellee and others, he gave to appellant, for her, the keys of the store and turned over to him the stock and contents. A few days afterward, a partnership having been formed between said Edna and H. L. Keller, appellee opened the safe for them, took out his papers, left the keys of the inner drawers inside and gave them the combination in writing; and thereafter from April 19, 1894, they had possession of the stock and store and carried on the business under their firm name of E. F. Keller & Co. Appellant assisted therein, but openly and only as the agent of his daughter, and appellee so understood.

About two months after the transfer was so made appellee caused a written demand for the safe to be served upon appellant, who then denied that it was in his possession and said it belonged to the firm. When the constable came with the replevin writ, H. L. Keller, one of the firm, told him it belonged to them and forbade his taking it.

Appellee testified that he bought it of the Cary Safe Co., of New York, but with the understanding that the right of property should remain in the company until he paid for it, and that he had not paid for it; and that when the trade was made, and again some days afterward, he told appellant that "the safe didn't go." Another witness stated that he was present when the sheriff turned over the goods, and there heard Mr. Rhodes say "the safe don't go." But he added that he saw only one safe in the room, and thought the one he saw was Mr. Frazer's; and on cross-examination said: "I understood there was but one safe reserved." It appears from the testimony of both the parties that besides the one in controversy there was another in another part of the room and that on it Mr. Frazier's name was painted. Since appellee did not claim that more than one was in any way reserved, it is probable that if he ever stated as he testified he referred to Frazer's.

All of this parol evidence as to the reservation was objected to when offered, upon the specific ground stated, that the bill of sale was conclusive of what was sold, and exception taken to its admission.

Appellant denied that he ever heard of any reservation of the one in question until about two months after the sale. H. L. Keller and the sheriff testified that they heard of none when the latter turned over the goods. Appellee's own act in giving the keys and combination to E. F. Keller & Co. contradicts him, and conclusively, since he never pretended that he loaned or leased it to the firm. But we think no contradiction on that point was needed, because the parol evidence, having been improperly admitted, is to be considered as out of the case. The safe was in the store, where appellee, whose name was painted on it, had used it in

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connection with the business for keeping the books of account, other papers, and money received in the course of his trade. Such an article was shown and is known to be a proper, convenient and common one in the equipment of such a store, and was therefore clearly within the description of "furniture." These facts fully identified the subject-matter, and there was no ambiguity in the instrument by which it was transferred.

We find in the case no competent evidence tending to prove that appellant wrongfully took or detained the safe; that when the suit was brought he was in possession of it, or that appellee then had or thereafter acquired any right of property in it or to possession of it. The verdict therefore should have been set aside. For error in refusing to allow the motion to that effect the judgment will be reversed and the cause remanded.

Mary Kenney v. Illinois State Journal Company.

1. **LIBEL—*Charging Misdemeanor Involving Moral Turpitude.***—An article charging that the plaintiff, by false pretenses, procured certain persons to subscribe for a book with intent to cheat and defraud such persons, in effect charges the commission of a misdemeanor involving moral turpitude and is actionable.

2. **SAME—*Defined.***—Everything printed which reflects on the character of another by imputing to him or her any felony or misdemeanor involving moral turpitude, dishonesty or dishonorable conduct, and tending to bring such other person into public contempt, hatred, scorn, or ridicule, is a libel.

Trespass on the Case, for libel. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1895. Reversed and remanded. Opinion filed December 6, 1895.

STATEMENT OF THE CASE.

The action was case by appellant to recover damages for the publication in the newspaper of the appellee company of an alleged libelous article, which was in words and figures as follows:

"A VERY CLEVER SWINDLE."**The Tardy Sequel to a Yellow-haired Girl's Visit in Springfield.**

A very clever swindle has been worked upon several of the State officers and heads of departments. Nearly a year ago a girl with yellow hair and winning ways introduced herself here as Miss Mary Kenney. She claimed to represent the Illinois State Federation of Labor. She canvassed for a book. When Miss Kenney told the State officers and the legislators that the State Federation of Labor was behind the book enterprise, no more questions were asked. The book was subscribed for as a matter of course, just as a man pays his taxes. Miss Kenney considerably permitted the buyers of the book to sign a contract.

Nothing was heard of the book until a few days ago, when Governor Altgeld, Secretary Hinrichson, Auditor Gore, State Superintendent Raab and numbers of others in the State house, received letters from the John W. Connerton Publishing Company, of Chicago, saying that they had drawn upon them for \$10, for the 'Official Labor Gazette of 1893,' with an explanatory clause that it was given to them for collection by the Illinois Federation of Labor. On the same day the book came, an insignificant affair, well dotted with beer and tobacco advertisements. In each case the drafts were returned not honored, and most of the books went back. An answer came back from the Connerton company, saying that they would be sorry to turn back the books and contracts to the Federation with the legend 'refused,' and hoped the matter would be reconsidered, in the interest of organized labor.

A copy was bought by Secretary Hinrichsen for the State library, but it will be returned. It is believed that the Federation of Labor had nothing to do with the enterprise."

The declaration contained three counts.

The first and second are not different in legal effect, and both allege the defendant intended by the article to impute to and charge the plaintiff with the crime of having

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designedly by false pretenses obtained the signature of divers persons to a written instrument, to wit, a written contract of subscription to the book, with intent to cheat and defraud, etc.

The charge set out in the third count is, the defendant wickedly and maliciously composed and published the article, intending thereby to bring the plaintiff into public scandal and disgrace, and to impute to and charge the plaintiff with having designedly used dishonest methods, and with cheating and defrauding in obtaining subscriptions to the book.

The defendant (appellee) interposed a demurrer, general and special, to the declaration and to each count, the special causes of demurrer being stated as follows:

1. The alleged publication is not actionable in manner and form as alleged.

2. The innuendo is too broad and is not justified by the alleged publication, wherefore, etc.

The demurrer was sustained by the court and the suit dismissed, the plaintiff electing to abide by the pleading.

This is an appeal from the judgment of dismissal.

WICKETT & BRUCE and JOHN C. SNIGG, attorneys for appellant.

If the words of the article are reasonably susceptible of the meaning ascribed by the innuendo the trial court erred in sustaining the demurrer. It is for the jury to say whether or not the meaning is properly ascribed. Whether or not the words are capable of the meaning ascribed is all the courts can pass upon.

When the words of an alleged libelous publication are not reasonably susceptible of any defamatory meaning, the court is justified in sustaining a demurrer to the declaration. But if they are reasonably susceptible of two constructions, the one innocent and the other a libelous construction, then it is a question for the jury which construction is the proper one; and in such case, if the defendant demurs to the declaration, his demurrer will be overruled.

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Ogden on Libel and Slander, 26. A rule involving substantially the same idea has been concisely stated thus: "It is for the court to decide whether a publication is capable of the meaning ascribed to it by an innuendo, and it is for the jury to decide whether such meaning is truly ascribed." *Hays v. Mather*, 15 Ill. App. 30.

In Newell on Defamation and Slander, p. 619, Sec. 35, it is said :

"But if the words are capable of the meaning ascribed to them, however improbable it may appear that such was the meaning conveyed, it is properly the province of the jury to say whether they were in fact so understood."

The article imputes the crime of obtaining, by false pretense, signatures to a written instrument, *i. e.*, contract of subscription.

In Starr & Curtis' Ann. Stat., Vol. 1, p. 781, Par. 141, Sec. 96, the offense is defined as follows:

"Whoever, with intent to cheat or defraud another designedly, by color of any false token or writing, or by any false pretense, obtains the signature of any person to any written instrument, or obtains from any person any money, personal property or other valuable thing, shall be fined in any sum not exceeding \$2,000, and imprisoned not exceeding one year."

The declaration need not be as precise as an indictment; it suffices that the language fairly imputes a crime. Words calculated to induce the hearers to suspect that the plaintiff was guilty of the crime alleged are actionable. Ambiguous words are slanderous if the hearers understood them to impute a crime. *Lafollette v. McCarthy*, 18 Ill. App. 87; *Drummond v. Leslie*, 5 Blackf. 453; *Dorland v. Patterson*, 23 Wend. (N. Y.) 422.

"An officer was put on the trail; said trail grew exceedingly hot along here, and the cattle and Myrick were all overtaken and captured near Riley McCrary's. Such is the unadorned tale as it reached our reporter's ears." See also *Republican Pub. Co. v. Miner*, 3 Colo. App. 568; *Halsey v. Stillman*, 48 Ill. App. 413; *McClean v. New York Press Co.*, 19 New York Sup. 262.

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In *Colby v. McGee*, 48 Ill. App. 294, the following words were held actionable *per se*, as charging adultery:

“Clara isn’t decent, and isn’t what I thought she ought to be. Al. had the mumps and they went down on him. Their first child is, in my opinion, either Charlie Turner’s or Charlie Hanah’s.”

In the case of *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, the following article was held libelous *per se*:

“A week ago, it will be remembered that a safe was cracked in Bothwell, and that two thousand dollars in money and about thirty dollars’ worth of stamps were stolen. Yesterday two hard looking citizens canvassed the entire business part of Windsor, in the effort to sell stamps at half price. They at last tried to sell the stamps to Postmaster Wigle, who had them arrested. They were searched at the station, and upon one of them was found thirty dollars’ worth of stamps. They gave their names as Edward H. McAllister and Lester B. French. Chief Bains will hold them to await developments.”

In *Ranson v. McCurley*, 140 Ill. 626, it was held that to charge an unmarried woman with being pregnant was a libel *per se*, as necessarily imputing fornication.

In *Booker v. State*, 14 So. Rep. 562, the words, “That he was satisfied that Bryant Mancill had held witnesses in the justice of peace court to swear to lies,” were held actionable *per se*, as charging the crime of bribery. *Savoie v. Scanlan (La.)*, 9 So. Rep. 916; *Doltaren v. Bushey*, 16 Pa. St. 209; *Gaines v. Belding (Ark.)*, 19 S. W. Rep. 236; *Upton v. Hume (Ore.)*, 33 Pac. Rep. 810.

The speaker of libelous words is accountable “for the import of such words as they will be naturally understood by the hearer,” even though some other persons might not ascribe the same meaning to them. *Dorland v. Patterson, 23 Wend. 422; Rep. Pub. Co. v. Miner, 3 Colo. App. 575.*

The words “it is believed,” at the end of the printed article do not detract from the libelous nature of the article. *Booker v. State (Ala.)*, 14 So. Rep. 562; *Doltaren v. Bushey, 16 Pa. St. 209; Beehler v. Steever, 2 Whart. (Pa.), 313; Treat v. Browning, 4 Conn. 408.*

BROWN, WHEELER & BROWN, attorneys for appellee, insisted that the innuendo materially enlarges the sense of the publication, and thus vitiates the pleading. Newell on Libel and Slander, page 629, Sec. 40.

It is for the court to say whether the meaning ascribed to the publication by innuendo is justified. Hayes v. Mather, 15 Ill. App. 30.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Everything printed which reflects on the character of another by imputing to him or her any felony or misdemeanor involving moral turpitude or fraud, dishonesty or dishonorable conduct, and tending to bring such other person into public contempt, hatred, scorn or ridicule, is a libel. 13 Amer. & Eng. Ency. of Law, 297-299; Newell on Slander, 43; Cevery v. Daily News Co., 139 Ill. 345.

The imputation of the publication in the case at bar is, to our minds, not at all doubtful.

It is, the appellant procured certain persons to subscribe for a book, by representing to such persons the Federation of Labor was promoting and was interested in the enterprise of selling the book, and she was acting in the matter as its agent or representative, while in truth the Federation of Labor had nothing to do with the business of selling the book and was not interested in the enterprise in which she was engaged, and her representations it had, and she was its agent, were false, and but part of a clever swindle practiced by her to procure such persons to agree to buy the book by inducing them to believe it was being sold in the interest of the cause of organized labor, and that such persons were induced to sign contracts to buy the books by the methods thus employed by her. Such is the unmistakable meaning of the published article giving the words and phrases used common acceptation and import. The assertion, it is believed the Federation of Labor had nothing to do with the enterprise, is equivalent to a direct statement to the same effect. Miller v. Miller, 8 Johns. (N. Y.) 74; Bocker v. State, 14 Southern Rep. 562.

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It is a misdemeanor involving moral turpitude, under the provisions of section 96 of the criminal code, to obtain the signature of another to any written instrument by false pretenses with intent to cheat and defraud the person whose signature is so obtained. The publication alleges the buyers of the books signed contracts, meaning of course written instruments.

A written subscription for or to a book is a written contract to accept and pay for a book when delivered, or upon stated terms and conditions. Black, Law Dictionary, 1131.

If accepted it becomes a legal obligation, and may be enforced in courts of law; is the subject-matter of forgery (People v. Matt, 34 Mich. 80), and is a "written instrument" within the meaning of these words as used in the criminal code.

The publication, we think, imputed to the appellant the statutory crime of obtaining signatures to written instruments by false pretenses, and if that be true, it follows the demurrer to the first and second count should have been overruled.

The charge in the third count is, it was intended by the publication to impute to and charge the appellant with designedly having used dishonest methods, and with cheating and defrauding others in the prosecution of her business of canvassing for subscribers to a book.

The publication bears this interpretation, and we think a good cause of action is set out in the third count.

In the view we are constrained to take, the judgment must be reversed and the cause remanded with directions to the court to overrule the demurrer and require the appellant to plead to the declaration.

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Mary A. Bumgartner et al. v. Henry B. Hall et al.

1. **DECREES—*What is not a Money Decree.***—A decree for a mechanic's lien in the alternative that the money be paid within a given time or the property sold, giving the owners of the property the option to pay or

suffer the sale to proceed, is not a personal money decree, and can not be enforced by execution or other process against the persons or general property of the defendants in the decree.

Bill for a Mechanic's Lien.—Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 6, 1895.

STATEMENT OF THE CASE.

Appellees, who are carpenters and contractors, obtained a decree in the Circuit Court establishing a lien upon a certain lot owned by Mary A. Bumgartner, one of the appellants, for the amount remaining unpaid to said appellees and their sub-contractors for work performed and material furnished in and about the construction of a dwelling house on said lot.

The court found and recited in the decree the following facts as having been established by the evidence:

“That Frank X. Bumgartner, with the knowledge and consent of Mary Bumgartner, his wife, entered into a contract in writing with the complainants for the erection of a dwelling house on the lots owned by the said Mary Bumgartner; that immediately after the making of said contract and in compliance with the terms thereof, the complainants commenced work upon said building and erected the same upon the said lot; that after said contract was entered into as aforesaid, said Mary Bumgartner ratified, adopted, acknowledged and accepted the said contract made by said Frank X. Bumgartner as her agent, and from time to time, during the progress of the work until its completion, took charge of the construction of said building, and took the said contract as her own, and from that time on made changes in the plans and construction of the house, and claimed the house, and demanded its completion and demanded possession of said house as her own, and took possession thereof, and moved into said house, and does now and ever since said time has occupied the same as her own property with her family; and that the said Mary Bumgartner is liable to the

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complainants for the labor and materials furnished by them in the erection of the dwelling house upon said premises, and that there is due the complainants the sum of \$2,151.07, for which they are entitled to a lien on said premises; that there is due certain sub-contractors and material men from complainants, for labor and materials furnished in said building, various sums. It is therefore ordered, adjudged and decreed that complainants and said contractors have a lien on said premises for the amount so found due, and that the defendants, Mary Bumgartner and Frank X. Bumgartner, within twenty days from this date, pay to M. U. Woodruff, special master in chancery of this court, the said sum with interest from this date, to be distributed by said special master between said sub-contractors and complainants after the payment of costs, according to their respective interests, and in case of default that said premises be sold at public vendue by said special master.

This is an appeal from the decree.

PATTON, HAMILTON & PATTON, attorneys for appellants.

SCHOLES, SELBY & HERNDON, attorneys for appellees.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

A thorough examination of the testimony has convinced us the findings of the court are well sustained.

To here state the proofs in detail would be of no benefit to the litigants, counsel or the profession.

The decree declaring a lien was the necessary result of the application of the law to the facts proven.

Though the decree ordered and adjudged that Frank X. and Mary A. Bumgartner pay the amount for which the lien was established to the master within twenty days, yet it is not enforceable as a money decree against them or either of them.

Compliance with this order could not be enforced by execution or other process against the person or general property of both or either.

Non-compliance therewith had no other effect than to subject to sale the property upon which the lien existed.

The decree is an alternative one, that the money be paid or the property sold, giving the owners of the property the option to pay or suffer the sale to proceed. *Gochenour v. Mowry*, 33 Ill. 331; *Phelan v. Iona Savings Bank*, 48 Ill. App. 171. Decree is affirmed.

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Frances A. Craig v. James R. Craig et al.

1. *ALIMONY—Decree for, not Res Adjudicata.*—A decree for alimony is not *res adjudicata* if facts occur after its rendition which make it proper the decree should be altered or revised. The power of the court over the subject-matter is not exhausted by the entry of the original decree, but is continuing for the purpose at any time of making such alterations as in the exercise of a judicial discretion may appear to be just and proper.

2. *SAME—Abuse of the Discretion.*—The abuse of this discretion may be corrected in courts of review, but unless it is shown to be unreasonable or unjust, the action of the court below should be accepted and approved.

3. *SAME—Revision of the Decree for.*—It is not indispensable to the revision of a decree for alimony that the husband should make formal application therefor; the question may arise as well upon the application of the wife for equitable assistance to enforce the payment of the alimony.

Bill to Enforce Payment of Alimony.—Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 6, 1895.

FRANK R. HENDERSON and EZRA M. PRINCE, attorneys for appellant.

CHARLES M. PEIRCE, attorney for appellees; JAMES S. NEVILLE, guardian *ad litem*.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The appellant, Frances A. Craig, and appellee, James R. Craig, were husband and wife.

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She was granted a divorce for his fault and decreed the allowance of alimony at a fixed rate per month. He paid a small part thereof in money and his homestead right was afterward sold to aid in further satisfying the decree.

His children by a former wife held title to the fee of the homestead.

Appellant filed a petition to a subsequent term of court praying the aid of the court of chancery to subject this title to the payment of her decree for alimony on the ground they held it in fraud of her rights.

Upon the hearing of the petition the court revised the former decree in her favor, fixed a gross sum to be paid her in full for all her claims past and future for alimony and decreed the interest of appellee's children aforesaid in the homestead tract subject to sale to discharge the amount so fixed to be paid to her.

By this appeal she questions the power of the court to alter the former decree in her favor and reduce the amount ordered therein to be paid, and she questions also the propriety of such action even if the court had the power.

A decree for alimony is not *res judicata* if facts have occurred since it was rendered which makes it proper the decree should be altered or revised. Cole v. Cole, 142 Ill. 24.

“The power of the court over the subject-matter of alimony is not exhausted by the entry of the original decree but is continuing for the purpose at any time of making such alterations as shall appear to the chancellor in the exercise of judicial discretion to be just and proper.” Cole v. Cole, *supra*.

The abuse of this discretion may be corrected by courts of review.

But unless shown to be unreasonable or unjust, the action of the chancellor should be accepted and approved.

In the case at bar the petition for divorce was heard before and decided and alimony fixed by the chancellor who rendered the decree appealed from. His knowledge of the parties and their differences and contentions and of a variety

of circumstances which we can not so well know gave him superior advantage to determine justly between them. Since he entered the decree awarding alimony to the appellant he has at her application rendered other orders designed to aid her in collecting her money. By virtue of one of such orders the homestead right of the appellee was exposed to sale and sold and he forced to deliver it up to the purchaser.

Finally the appellant presented a bill to the same chancellor asking that the fee interest held or claimed by the children in the homestead should be declared subject to sale to discharge her claims. Upon that application the chancellor rendered the decree appealed from declaring the interest of the children subject to the claim of appellant as revised and reduced by the decree.

We do not doubt the power of the chancellor to so deal with the decree for alimony and can not say the discretion vested in him has been abused or unreasonably exercised.

It is not indispensable to the revision of a decree for alimony the husband should make formal application therefor. The question may arise as well, upon the application of the wife for equitable assistance to enforce payment of the alimony.

The declaration in *Cole v. Cole*, *supra*, that relief should not be granted in that case because the husband was in default in his payments of alimony and hence in contempt of the decree, must not be accepted as announcing a general rule to that effect, but only as declaring the rule applicable under the facts of that case.

If default in payment would invariably forbid relief, the power of the court over such decrees would be restricted to controlling future payments, thus making all decrees for alimony *res judicata* without regard to the changed situation of the parties, or equitable considerations which ought to relieve from the payment of past due allowances.

The complaint the court heard no testimony tending to establish facts warranting interference with the original decree is not well grounded.

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The pleadings were such the court had before it all former proceedings relating to the question of alimony, including the action taken by the court upon various applications of the wife for assistance in enforcing the decree. The sale of the homestead was disclosed and an affidavit filed by the husband in reply to an application that he be attached for contempt in failing to meet payment of alimony, was admitted in evidence upon the concession of the appellant that material statements thereon were true.

Facts thus came to the court which induced the action taken.

We see no reason demanding interference therewith.

The decree of divorce became *res judicata* at the adjournment of the term at which it was rendered. Hence we can not consider the cross-errors attacking it.

Decree affirmed.

H. Coons v. S. M. Drake.

1. **AGENTS—Must Have Authority.**—A person who assumes to bind another as his agent must be shown to have had authority to do so.

2. **NEW TRIALS—Newly Discovered Evidence.**—The fact that a school record showed that a pupil, who testified in the case, answered to the roll call every school day of the week in which the transactions in question took place, is not decisive of anything pertinent to the case, and is not cause for a new trial.

Assumpsit, for goods sold. Appeal from the County Court of McLean County; the Hon. C. D. Myers, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 6, 1895.

CHARLES M. PIERCE, attorney for appellant.

W. B. CARLOCK, attorney for appellee.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Appellant sued appellee before a justice of the peace for

a balance alleged to be due on an account for goods sold. On appeal it was tried without a jury, and the court found the issue and rendered judgment for the defendant for costs.

Appellant's claim was, and the evidence on his part tended to prove, that his family being about to move out of the residence they had been occupying and that of appellee to move in, the latter's wife bought of him certain articles and at the prices following, viz.:

For a parlor carpet, a cooking range in exchange and

cash	\$3.75
" a stair carpet.....	6.00
" a bedstead, spring and mattress	1.50
" a clothes line and post.....	50

She delivered the range and paid \$5.25, being for boot on the parlor carpet and for the bedstead, springs and mattress, but refused to take or pay for the other articles, leaving a balance due of \$6.50.

Mrs. Drake testified, over objection to her competency, that her agreement as to the articles refused was only conditional; and her daughter, a school girl about eleven years of age, corroborated her. These conditions were, that she couldn't make her own stair carpet do, and that the line and post, which she hadn't seen, were sound and right, as he represented; and their testimony was that hers was found to do very well, and that the post was rotten and propped and the line not full.

The points urged against the judgment are that the court erred in admitting the testimony of Mrs. Drake and in overruling the motion for a new trial on the ground of newly discovered evidence impeaching the daughter.

It is said that for the expense incurred for these articles the husband and wife were by the statute made liable jointly and severally, and that therefore the wife was not the agent of her husband.

But appellant here sought to make the husband alone respond, on an express contract made by the wife alone. If she was authorized to bind him thereby it must be be-

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cause she was his agent in that behalf, whatever more or else she may have been. Since he did not act by himself he must have acted, if at all, by another. It is immaterial whether her authority was derived from his appointment or from the statute. Unless she was authorized we know of no principle upon which he would be bound. We think she was a competent witness.

The newly discovered evidence was that the school record showed the witness as answering to roll call every school day of the week in which the transactions in question took place. This is not decisive of anything pertinent to the case; much less of the case itself. The motion was properly overruled and the judgment will be affirmed.

Charles E. Whitton v. Laura B. Whitton.

1. JUDGMENTS BY CONFESSION—*Motion to Open—Burden of Proof.*—On a motion to open a judgment entered upon a judgment note the burden of impeaching the judgment is upon the party making the motion, and where it appears from his affidavits in support of his motion that he will, if let in to plead, be unable to sustain his proposed defense, the motion is properly denied.

2. SAME—*Motion to Open—Equitable Jurisdiction.*—A motion to open a judgment entered by confession, and to let the defendant in to plead, comes within the equitable jurisdiction of the courts of law over such judgment, and should be freely exercised to allow it in a clear case, but not otherwise.

Motion, to open a judgment, etc. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 6, 1895.

D. D. EVANS and WILL BECKWITH, attorneys for the appellant.

E. WINTER, attorney for appellee.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

On October 17, 1894, appellee caused to be entered up in open court a judgment for \$3,383, and costs against appellant, by confession under a power of attorney, upon the note to which it was attached and which is as follows:

“\$1,550. HOOPERSTON, ILL., March 1, 1888.

Five years after date we or either of us promise to pay to the order of Laura B. Whitton, guardian, fifteen hundred and fifty dollars, value received, with six per cent interest per annum from date, payable annually, and ten per cent attorney's fees in case of collection by suit at law.”

Then follows the power of attorney to confess judgment, in the usual form, and the attestation clause and date, “Witness our hands and seals this 1st day of March, A. D. 1888,” with signature and seal of appellant alone. The amount of the judgment includes \$216.63 for attorney's fees. Execution issued thereon January 21, 1895, which was served on appellant February 9th, immediately after which he commenced this proceeding, which is a motion to open the judgment and let him plead. On hearing it the court allowed the plaintiff to remit \$61.63, to be credited on the judgment as of its date, and then overruled the motion; from which order defendant took this appeal.

The reasons assigned for the motion were that he had not been served with process, nor had his day in court; that he had a meritorious defense to the whole of said note; in that it was never delivered to the plaintiff, was never completely executed, and was wholly without consideration. The evidence in support of them consists of affidavits of himself alone. In opposition thereto were those of appellee, her son, and two attorneys—the latter being only to prove that appellant was informed of the entry of the judgment on the 15th day of December, being still of the term at which it was entered. In a subsequent affidavit appellant admitted that he did then get notice of the judgment, but was advised by an attorney named that no action on his part could be taken in reference to it until execution issued.

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It appears that the parties are husband and wife. They were married December 16, 1884. She was then a widow, residing with her six minor children on an eighty acre farm in Iroquois county, of which her former husband died seized. Under an order of the County Court she sold it on March 5, 1888, for \$3,600, and received the price. The decree gave her \$500 for her dower, and \$1,500 for improvements thereon made by herself, leaving \$1,550 for the children. On the same day she purchased another farm of 217 acres, in Vermilion county, for \$7,000, paying \$3,500 (including a mortgage of \$400, which she assumed), out of the proceeds of of the sale, giving a mortgage back for the residue, and taking the deed in her own name. About January 1, 1891, she conveyed to appellant eighty acres of it, for which she received nothing at that time.

So far the parties agree. But as to everything else touching the merits of this case they widely differ. His statement is that in view of his money and labor spent upon the farm, by which he paid off the mortgage assumed by her and made improvements to the amount and value of over \$2,000, he was not satisfied to have the title entirely in his wife, and therefore had her make the conveyance of eighty acres to him. Soon afterward she began to insist that they should either pay the children their share of said eighty acres, viz.: \$1,500, or give them something to show it was due to them. He didn't owe them anything, but to stop the family unpleasantness and keep the peace, finally determined, without saying anything to her, that he would assume one-half if she would the other. Some time during the summer of 1893 he had the judgment note drawn up, dated back to about the time she received the money for the Iroquois farm, and signed it, intending to have her sign it also. When he got home he pulled it out, showed it to her and said: "Here is a note that will show we owe the children," but before he could request her to sign it she said: "Their money is in the land; I don't want anything to do with any note." Whereupon he put it back in his pocket and never saw it again until he saw it in the files of this case. He never deliv-

ered it to her nor authorized such delivery. How it came into her possession he did not know. He was living with her then, in the same house, and has been ever since. It was contrary to his intention that it ever should come into her possession without her signature as a joint maker. When she refused to have anything to do with the note the matter passed out of his mind and he thought no more about it until he learned of this judgment.

Appellee's story, affecting the merits, so far as it differs from his, is in substance, that when they were married he had no money. That when the note she had given for the deferred payment on the 217 acres, secured by mortgage, became due she was obliged to borrow \$3,200 to meet it, and to give a new mortgage as security. When the papers were made out and ready to be executed appellant refused to join her in the execution thereof unless she would agree to convey to him eighty acres of the land, worth at a fair valuation \$50 per acre; which she did upon his agreement to execute to her, as guardian of the minor children, his note for \$1,550 with interest at six per cent from the time their money was invested in the land. He delayed doing so from time to time. It was never suggested by either of them that she should join as a maker of such note, but on the contrary, it was understood that he should be alone liable for the amount of it. Ever since he executed it the note has been in her possession as guardian. She has often talked with him about it and urged him to pay it, but been put off by him until she was compelled to sue. He never paid anything toward the purchase of the land or any part of it; has always complained of being in ill health and unable to perform hard manual labor, and has mostly been engaged in overseeing the farm. All the improvements made and indebtedness paid upon it has been paid from its products, and her sons—Clarence, who was sixteen, and William, who was thirteen years of age when they moved upon it, and Arthur, who died July 14, 1894, aged eighteen years—have remained with her, and labored early and late in improving the land and raising crops thereon, and per-

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formed the hard manual labor necessary to raise them. She has not yet made her final settlement as guardian, but has been advised that it is necessary, and in order to make it she is desirous of collecting the note in judgment. She denies the statement by appellant that she ever said to him that the children's money was in the land and she didn't want anything to do with any note.

Letters of guardianship, issued to her September 19, 1887, by the County Court of Iroquois County, were in evidence.

The affidavit of her son Clarence corroborates that of his mother as to the value of the eighty acres when they were conveyed to appellant; how the means to pay off the \$400 mortgage and make the improvements were obtained; the labor of the boys, and appellant's complaints of his ill health and inability to work. He further swears that he has often seen the note in his mother's possession during the last year or two, and he heard her and appellant talking about it.

Appellant's further affidavit denies that the means to pay off the incumbrance and make the improvements were derived from the products of the farm, and that he complained of his health as alleged, and states that until the last two years his general health was good; that during those two he has taken an active part in the work of the farm, and ever since he went on it performed all kinds of hard farm labor.

The foregoing embraces substantially all the evidence. From the statement of appellant himself, it seems highly improbable that if let in to plead he will be able to produce a single additional witness or any other evidence as to the decisive points in the case, viz., the complete execution, actual delivery and real consideration of the note. The burden of proof to impeach it will rest upon him. Against the showing made by its production and the positive testimony of two witnesses as to appellee's possession and appellant's knowledge of the fact, what can he offer as a preponderance except his own uncorroborated and somewhat unreasonable statement? With full opportunity and urgent occasion to do so, he does not make even a bare denial of

the sworn statements as to the value of the land he got, and his pecuniary condition at the time of his marriage. The reasonable inference from what he states and omits to state, is that although a single man, of general good health and ability to do hard work, he had lived to be the husband of a widowed mother of six children, without accumulating a dollar or a dollar's worth of anything but his clothes. How, then, except from the products of the farm, had he become able, so soon after his marriage, to pay off an incumbrance and put improvements upon it to an amount and value that would be a fair consideration for land worth \$4,000? His wife was already bound, and with sureties, to the children for the full amount of this note. If his intention was to relieve her of half, why didn't he make his note to her, not as guardian, for only \$775? If she refused to join on the one he made, as she agreed, why didn't he at once destroy it? Did he put it in his pocket, uncanceled, and never again see it or talk of it or think of it for more than a year and after it became merged in a judgment against him, although his wife had been and was disturbing the peace of the family by persistently insisting that they—he and she—should either pay the children the amount of it, or give them something to show and secure the debt? Did she, though so insisting, flatly refuse to have it done on the instant that he offered to do it?

Further comment upon his statement would be useless. It appears to be highly improbable, and so far as it enables us to reasonably anticipate, would not be corroborated on a trial. On the other hand, that of appellee is already corroborated and seems natural and probable in itself. If she conveyed to appellant \$4,000 worth of the land in which her children's money, due from her, had been invested, without other consideration than is here shown, she might well require that he should become responsible for and secure the payment of that debt. That he did, the note made to her as *guardian*, is natural and very persuasive proof. Why should she have joined in it, thereby promising in one capacity, to pay to herself in another, for her children, what

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she was already otherwise bound to pay them? He had participated with all the freedom and fullness of a husband's right in the products of the entire farm, and the labor of her children thereon; as it was, it left him the value of nearly \$2,500 in the eighty acres, and a contingent dower right in the residue, and therefore no impressive occasion for sympathy in his application to be relieved from its apparent obligation.

Such a motion as this is within the equitable jurisdiction of the courts of law over such judgments, and should be freely exercised to allow it in a clear case, but not otherwise. It is not specially favored. The presumptions are against it. Such a contract as is imported by the instrument here in question is legal, and on its face authorizes judgment without process. It is not equitable to nullify it or suspend its operation, without good cause, *dehors*, clearly shown. The *ex parte* affidavit of the obligor or promisor alone ought not to be held sufficient, as a rule. The party in adverse interest should also be heard where it is practicable, and the determination, which rests in sound judicial discretion, should be reversed only in case of apparent abuse of that discretion. Citation of authority for these propositions is deemed unnecessary. In this case we see no such abuse.

It is said the court erred in allowing the *remitititur* of the excess awarded for attorney's fees. If so it was not for want of power to allow it, and if a mistake in judgment, it favored appellant, who therefore should not complain of it.

So also, it is said that the judgment was erroneous in awarding costs, for the reason that the warrant of attorney did not expressly authorize a judgment for costs. No reason is perceived or suggested why costs should not follow a judgment for damages by confession as in other cases, by force of the statute. The order of the court below, overruling appellant's motion, will be affirmed.

**Board of Education v. Amanda E. Lease, Guardian of
Heleah M. and Maud B. Henkel.**

1. **SCHOOLS—*Children Residing with a Guardian.***—Children of school age residing with a guardian exercising parental control over them, and having the sole control and management of their estate and sole control of them personally, are entitled to admission to the public schools of the district in which they and their guardian are domiciled.

Mandamus.—To compel Board of Education to admit children to school. Appeal from the Circuit Court of Montgomery County; the Hon. ROBERT B. SHIRLY, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 21, 1895.

JAMES M. TRUITT, attorney for appellant.

LANE & COOPER, and W. A. HOWETT, attorneys for appellee.

OPINION PER CURIAM.

This is an appeal from a proceeding by mandamus, wherein the appellee obtained a judicial order requiring the appellant to admit the wards of appellee to the common school of the district. The only question was whether the said wards were entitled to school privileges in the district. The issue was tried by jury and found for the appellee and judgment followed. The parents of these children, who reside in the State of Alabama, had placed them under care and control of the appellee, who is their aunt, for an indefinite period, that is to say, as long at least as she should remain in Nokomis, in said county. The children inherited some property from their grandfather consisting of personal property and an interest in certain realty, being the property occupied as a residence by the appellee, and by the order of the County Court she was appointed their guardian. In a contingency, that of her moving away from Nokomis during their mother's lifetime, the children were to be returned to the parents, but in the event of the mother's death they were to remain with her

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permanently. For the time being at least, she was not only their guardian but by express consent of the parents had parental authority over them in all respects. She had sole control and management of their estate and sole custody of them personally. Nokomis was her domicile and was within said school district.

We think such state of facts gave them admission to the public school of Nokomis. It is not indispensable that they should have a legal domicile in the district. If they were actually resident there with no present purpose of removal—even though the stay was in a certain sense not permanent—in that a contemplated contingency which probably would not soon, and possibly might never, occur, would end it—they were within the policy of the law which intends that “all children in the district over the age of six and under twenty-one years” (Par. 5, Sec. 26, Art. 5, Ch. 122, R. S.), shall enjoy the right and opportunity of an education. The use of the words “resident” and “non-resident” as found in section 27, and perhaps elsewhere in the statute, is not significant. No doubt residence, as there indicated, is to be understood in its broad sense of habitancy, the act of dwelling or abiding in a place.

The education of youth is a matter in which the State, upon admitted grounds of public policy, finds it expedient to expend, through the agencies provided, vast sums of money.

It is a matter of public concern that all children in the State within the specified ages shall receive instruction, and the law makes it obligatory upon every person having control of any child between the age of seven and fourteen years, to cause such child to attend some public or private school for at least sixteen weeks each year, subject to certain exceptions. Reference to adjudications in other States is of but little profit or assistance, because the matter is wholly statutory; but as illustrating the view we are inclined to adopt we cite *Yale v. The West Middle District*, 59 Conn. 489. It was there said in a case somewhat like this and in view of a statute somewhat like ours, “if any child is actually dwelling in any school district so that some person there had the

care of it, and is within the school age, and not incapable by reason of physical infirmity of attending school, and is not instructed elsewhere, then that child must go to the public school."

It would not be insisted that the father must be a voter at the place or anywhere before the child may or must go to the public school. Very many conditions may occur which might render the residence of the parent or person in control of the child more or less indefinite as to the time and more or less dependent upon contingencies and yet the child should not be deprived of school privileges.

As we regard the case made by the proof the judgment is right, and could not properly have been for the appellant. Hence it is unnecessary to consider the instructions, nor to follow counsel in the discussion of the various objections taken to the action of the court in that regard. The judgment will be affirmed.

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Edward B. Sanner et al. v. Union Drainage District.

1. *CERTIORARI—Does Not Lie to Question the Organization of a Drainage District.*—A common law writ of certiorari does not lie for the purpose of testing the legality of the organization of a drainage district. The statute has furnished another remedy by information in the nature of quo warranto.

2. *SAME—Does Not Lie Where Another Remedy is Provided.*—Where the classification of lands in a drainage district is complete, it is competent for any person interested to appeal to three supervisors, as provided by statute, and thus obtain a correction of errors in such classification, and if he neglects to avail himself of the right of redress so provided, he ought not to be heard in another forum.

3. *MANDAMUS—Lies to Compel Supervisors to Act.*—Where an appeal from the classification of lands in a drainage district is taken to three supervisors and the supervisors refuse to act, the remedy is by mandamus to compel them to act.

Certiorari.—Appeal from the Circuit Court of Shelby County; the Hon. JACOB FOUCHE, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 21, 1895.

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MOULTON, CHAFFEE & HEADRIN, attorneys for appellants.

HAMLIN & KELLEY, attorneys for appellee.

OPINION PER CURIAM.

The appellants filed in the Circuit Court of Shelby County their petition for a common law writ of certiorari to bring before said court the record and proceedings of the appellee.

The court upon hearing dismissed the petition and quashed the writ of certiorari at the cost of the appellants, from which judgment the present appeal is prosecuted. The petition, at considerable length, set out certain proceedings which had for their object the organization of said drainage district, and pointed out several supposed defects therein which, as averred, vitiated the organization. It also presented certain objections to subsequent proceedings relative to the classification of lands in the district, and an appeal therefrom and the proceedings on the appeal.

The prayer was that a writ of certiorari be issued requiring the said drainage district to bring before the court a transcript of all the documents, papers, files and records in any wise relating to the organization of said district to the end that the court might inspect said record and proceedings, and if found irregular that the same might be set aside.

In the case of *Lees v. The Drainage Commissioners*, 125 Ill. 47, it was held that the common law writ of certiorari does not lie for the purpose of testing the legality of the organization of a drainage district, for the reason that the statute has furnished another remedy, by information in the nature of quo warranto. This disposes of the point mainly argued by the appellants and perhaps of all that was before the court.

It will be noticed that the prayer of the petition is limited to the proceedings upon which the organization of the district was predicated, and nothing further seems to be within the scope of the relief desired. The petition, however, re-

fers in detail to the action of the district in making a classification of the lands and to the appeal therefrom. When the classification was complete it was competent for any person interested to appeal to three supervisors, as provided by the statute, and thus obtain a correction of any error in the classification; and, as was held in *The People, etc., v. Chapman*, 127 Ill. 387, if the property owner neglects to avail himself of the right of redress so provided he ought not to be heard to complain in another forum. It follows that the supposed erroneous action of the district in this respect can not be corrected by the common law writ of certiorari because another remedy is provided.

It appears from this record that an appeal was prayed to three supervisors and that the clerk of the district summoned three supervisors of Shelby county to appear and hear the appeal. The supervisors appeared and thereupon the district, by its attorney, objected, that as this was a union district, and as such embraced territory in Macon county as well as Shelby county, one of the supervisors should have been called from Macon county.

The supervisors deemed the point well taken and declined to consider the appeal for that reason, whereupon the clerk issued another order summoning two supervisors from Shelby and one from Macon to hear said appeal, and the three thus summoned met accordingly, when an objection was interposed by Edward B. Sanner, one of the appellants, to the formation of the board of appeal, because the supervisors were not eligible, and because they had not been convened in time. This objection was held good, and the board dissolved.

It may well be doubted whether the action of these boards of appeal can in any sense be considered as a part of the proceedings of the drainage district. Such appellate tribunal is provided by law for the purpose of reviewing and correcting the classification, is independent of and apart from the district, and it is not perceived upon what ground its proceedings are to be deemed a part of those of the district whose action it may modify and correct as may seem proper.

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Hence, there appears to be no propriety in connecting its record with that of the district, as was done by the petition in this case.

But whether so or not the remedy for any non-action by the board of appeal is not by certiorari. If in the manner provided by law the board was duly summoned, there is an apt and efficient remedy by mandamus to compel it to act.

We are of opinion the Circuit Court properly dismissed the certiorari, and its judgment will be affirmed.

William Moudy v. William Snider.

1. **QUESTIONS OF FACT—*For the Jury.***—The determination of questions of fact is for the jury, and when there is evidence to support its finding the verdict will not be disturbed.

2. **NEW TRIALS—*Newly Discovered Evidence.***—When the newly discovered evidence upon which a new trial is asked is not of such a character as would be likely to produce a different result, the motion is properly denied.

Assumpsit, for money had and received. Appeal from the Circuit Court of Ford County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 6, 1895.

C. H. PAYSON and J. H. MOFFETT, attorneys for appellant.

COOK & MOFFETT and E. C. GRAY, attorneys for appellee.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This action, commenced by appellee on March 14, 1894, was tried on the 5th of the following December, and resulted in a verdict and judgment for plaintiff for \$111.70. Defendant appealed.

The declaration was in assumpsit on *indebitatus* counts for money had and received, money loaned, work and labor, and interest, and the pleas were *non assumpsit*, payment, set-off and accord and satisfaction.

The claim was for money due plaintiff on a note he left with the defendant in January, 1893, which he collected on March 7, 1894, and refused to pay over the proceeds on plaintiff's demand.

It is conceded that the judgment is correct, unless the defendant by a preponderance of the evidence proved the set-off claimed, which was \$100 and interest from August 2, 1892.

Appellant was a farmer living in Champaign county. Appellee was a farm laborer and well borer, and worked for appellant at different times for different periods ranging from days to months. They were on very friendly terms.

On August 1, 1892, appellee came to appellant's house to assist him in haying. He finished his job and left in the evening of the next day. Appellant testified that on July 30th he drew from Ford County Bank at Paxton \$125 in three bills of \$100, \$20 and \$5; spent the smaller bills, excepting some change, in Paxton, on that day, and took home the residue in his pocket-book—the \$100 bill on one side and the change on the other; that in the afternoon of August 2d, while appellee and he were working alone in the hay mow, he wrapped his knife, watch and pocket-book, closed, in his handkerchief, and so placed them under one of the braces in the mow. At quitting time in the evening he went to get them, found the pocket-book unclasped on the side containing the change—which seemed to be all there—and put it in his pocket. While at the supper table, but after appellee had eaten and gone, the question how it came to be so unclasped suddenly arose in his mind, and on taking it out of his pocket and looking on the other side found it empty. He went to the barn to look for the money but did not find it. He at once suspected appellee, because he was the only other person in the mow that afternoon except a young girl who worked there and came up for fifteen or twenty minutes "to talk a little and gas." But he said nothing about it to anybody, thinking he would hear of his using it. He hired him for two months of the following winter for the purpose of watching him, and

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treated him as before, but discovered nothing to confirm his suspicion. Appellee appeared to be friendly as he had ever been. It was during that period of his employment that he left with him \$55 in money, one note for \$110 and another for \$90, and had a balance due him on a horse trade of \$5.

In February, 1894, appellant first heard that soon after the money was missed, appellee was seen by several persons at different times to have in his possession a \$100 bill, and thereupon charged him with having taken it from his (appellant's) pocket-book; which appellee defiantly denied. After several talks between them appellant returned the money and uncollected note, and paid him the balance due on the horse trade and a part of the proceeds of the note he had collected, but retained the amount of the missing bill and interest thereon from the day it was missed; and refusing to pay that, this suit was brought.

The only ultimate question of fact in the case was whether appellee got the \$100 bill as charged; upon which the burden of proof to establish the affirmative was upon appellant. Not one of the circumstances relied on, except that of his being with appellant in the hay mow, so far as they were claimed to be significant, was certainly shown, even by the witnesses for appellant, and were all except the one stated, positively denied by appellee, whose denial was more or less supported by reasonable probabilities and natural inference from their testimony.

Three witnesses testified to as many occasions on which he exhibited a paper that looked like a \$100 bill. The first was on August 17, 1892, a fortnight after the one in question was missed. It was on a farm only three or four miles from that of appellant, where they were assisting in threshing. He and Snider were pitching in the field. He says Snider had some paper money there, among which was a \$100 bill; that it was not an advertisement, but genuine money; that he looked at it and had it in his hands; just looked over it as Snider showed it to him, as he would any other money, and that it was genuine money, at least he would take it for

that. He did not say he looked at the back of it. He couldn't tell what bank it was on, nor whether it was a bank bill, a greenback, or a gold or silver certificate. He told Snider at the time that he was a fool for carrying his money around in that way.

The next was about the same time, between the 10th and 21st of the month, at a camp meeting in Sugar Grove, nine and a half miles southeast of Paxton. The witness was running a huckster's stand there. He says that Snider, whom he had known very well for seven or eight years, came up to his stand and pulling out what he took to be a \$100 bill said he wanted to smoke and wanted witness to change the bill. Snider laid it out flat. Witness did not have it in his hands nor see its back; couldn't tell "what issue or what sort of an issue it was," but from what he saw he took it to be a good bill.

The third occasion was on Monday, the 27th of the same month. The witness was in a buggy, going northwest to Paxton, and when within a mile and a half or two miles of it, met Snider going in the opposite direction in a wagon with well tools on it. He had been to town. When they met they stopped and had some talk about how they were getting along and how much money they were making. They had been well acquainted for eight or nine years, worked and been much together. Witness had been interested in the huckster stand above referred to and was telling how much they had made on it. Snider doubted it and said, "I will bet you \$100, you didn't make near that much." Witness replied in a joking way, "Oh, well, you haven't got \$100;" to which Snider answered, "I will just show you that I have," and pulled out and showed witness what to him appeared, and he believed to be a \$100 bill. It was folded up when he took it out of his pocket, but he unfolded it and showed both sides of it. The witness said, "Of course I thought it strange that Snider had a \$100 bill loose in his pocket, but didn't think very much about it."

Mr. Shaw, cashier of the First National Bank at Paxton, testified that he knew appellee by sight; that on the 27th

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day of August, 1892, he received from him at the bank a deposit of \$115; that he "presumed" it was in bills of different denominations, and was "of the impression" that he had one large bill, a \$100 bill, but "would not be positive about that." He said, "to the best of my recollection he had some two or three or four bills, and I think one was for \$100. * * * I don't know that I was particularly impressed at the time. It was a common thing to happen. * * * We have a large number of depositors, five or six hundred. * * * I can only say that part of this deposit was a \$100 bill as my best impression." He could not say how many people made deposits that day; supposed the usual number; nor tell who deposited on that day, or within a week of it, but by the books, nor testify as to the denomination of the bills deposited unless it was specified in the deposit slip, or was an unusual amount, or there was some special circumstance to make him remember it. His attention was first called to it by appellant, and only about a week before the trial, which was considerably more than two years after the transaction.

It is worthy of notice that the deposit was made on the same day that appellee, going away from Paxton with tools for well boring, met his friend, the witness Martin, and showed him what he took to be a \$100 bill. Martin said their talk was brief; that appellee was working for some one and seemed to be in a hurry to go on. The time of day at which the deposit was made or the meeting took place was not shown, but the strong probability from the circumstances is that the deposit was made before appellee left Paxton. Banks usually closed long before the day's work of a farm laborer or a well borer ended. He would hardly have gone on to the place of his job, quit work during working hours and returned to Paxton before the bank closed.

It is not pretended that there were more than one \$100 bill, or one likeness of it in evidence. If he had previously deposited such bill, he couldn't have shown it to Martin, and if he had such, it was altogether probable he would have deposited it with the others, rather than carry it about loose

in his pocket. Hence the almost irresistible conclusions are that he did not deposit it, and also that what he did show to Martin was not such; and if not, then it is equally probable that what he showed to the other witnesses was not a genuine bill.

Appellee, who alone certainly knew the facts, positively testified, that although he saw the handkerchief placed as stated, he did not touch it; did not deposit nor show to anybody a genuine \$100 bill, and never had one; that what he had and showed was not a bank bill, nor paper really representing money of any kind, nor a counterfeit of any, but an advertisement, such as is often seen, in the likeness of such and so clear an imitation as might deceive anybody who only looked at, without handling or examining it; that he had carried it in his pocket a long time, forgotten of whom or how he obtained it, paid no particular attention to it and couldn't describe it at all minutely; had shown it occasionally to the young men in the neighborhood, for their astonishment and his own amusement, so handling and exhibiting it as to prevent their "catching on," and finally gave it to Eddie Henry, a grandson of Mr. and Mrs. Strayner, with whom he (appellee) made his home during much of the time. They testified that they saw it—she in his possession at several times in the summer of 1892, and both in that of the little boy, who also testified that appellee gave it to him and that after keeping it a week or so he lost it.

The actual possession by appellee of a genuine \$100 bill, after appellant's was missed, was the vital question in the case. Is it at all strange that the jury found the fact not proved by this evidence? It did not appear that appellant ever saw it after he put it in his pocket-book, nor to what extent, if any, it was exposed to loss before he missed it. If appellee took it he must have done so almost under the eyes of its owner, with whom he was working, in a little space, all the afternoon. His opportunity was hardly as good as that of the gassing girl in his employ, who was free to roam all about the mow unnoticed, while appellee could not well be out of his sight long enough to disturb the handkerchief,

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take out the money, wrap and replace the pocket-book, knife and watch just as he found them, without discovery. If he had any reason to suppose there was money there, he knew the owner would very soon miss what was taken and might before they left the mow. They worked on together until appellant got his handkerchief and they went to supper. Appellant says there was nothing strange in appellee's leaving as he did, nor had he any recollection afterward of anything in his conduct or manner during the afternoon to excite suspicion. He knew that appellee was going that evening to George Thompson's to work. He had been working for the farmers in the neighborhood many years. He continued to do so up to the time of the trial. Yet it is claimed that within a few days after the theft, so peculiar in its circumstances, and that exposed him to imprisonment for ten years, he was showing the stolen property, of such unusual character as to attract notice and cause remark, to the young men about there, carrying it loose in his pocket, offering it at a camp meeting in payment for a cigar, and finally depositing it in its original form in a bank where the owner was likely to do business.

Such circumstances were highly improbable in themselves, even upon the supposition of his guilt. The alleged fact of his taking the money was positively denied, and the circumstances tending to prove it were not unreasonably explained. When first charged with it, and the name of a person was given as one who had seen such a bill in his possession—the only one given before the trial—he promptly proposed to go with appellant to see him. After some delay on appellant's part, they did go, and appellant was allowed to see him alone while appellee remained outside. Their accounts of the interview, as reported by appellant when he came out, differ, but the fact is, that he did not produce the party as a witness on the trial, although he resided in Paxton.

Two other circumstances were brought into the case on the part of appellant which may deserve a brief notice. One was that appellee had once taken some money of George Thompson, without his special authority or knowledge.

This was admitted, and, in our opinion, fairly explained; and if it had not been, was incompetent as evidence. The other was that a week before the trial, in the course of a conversation with a witness who lived a half mile from him and knew him well, in the presence of Miss Strayner, in which, among other things, they talked about counterfeit money, appellee expressed a wish that he had a counterfeit \$100 bill, and asked the witness if he could get one for him, but did not state what for, particularly, but for a purpose. They both knew this suit was pending and what it was about. The inference drawn is, that he wanted it to produce on the trial and claim it was what appellant's witnesses saw. But for that purpose it would serve no better than his advertisement. He was, doubtless, already committed to the advertisement theory. How could he want to produce a counterfeit bill, if he got one, for any such purpose, with these witnesses ready to prove how lately he got it? But his advertisement had been lost and he couldn't procure another. He might properly want a counterfeit to test the ability of appellant's witnesses to distinguish a counterfeit from a genuine bill, with no better opportunity for examination than they had, and to show, if he could, that his advertisement was as good an imitation of a genuine bill. We think the inference sought to be drawn far-fetched and unreasonable.

This statement of the evidence shows that the question involved was eminently one to be finally determined by a jury, and that there was quite enough to support their finding.

Among the grounds stated for the motion to set it aside and grant a new trial, was that of newly discovered evidence.

Appellee was asked where he got the money he deposited in the bank, and answered that after so long a time—over two years—he could not state positively. But he had been at work most of his time, economical and saving in his habits, and received it from a number of persons who had owed him for work or for loans. He named eight or nine,

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from three or four of whom he got money that he believed went to make up the \$115 deposited.

In support of the motion the affidavits of four or five of these named were submitted, showing how much the affiants respectively, had paid him, and when; two of whom fixed the time of their payments at a date shortly after that of the deposit, and two others at a considerable time before—one, of an amount not exceeding ten dollars, as early as the year 1889. But he was shown to have been industrious and saving of his money—having little occasion to spend it except for his clothes. He did not use tobacco nor drink liquor. These affidavits do not tend to impeach his veracity, but rather to show it; nor even his memory. Who could say positively, two years and four months after a deposit of \$115 in several bills of no uncommon denomination, just when, where, of whom, and for what he obtained them? Appellee fully admitted that he couldn't. If he did not deposit appellant's bill, nor any proceeds of it, then it was wholly immaterial where or how he got what he did deposit. If the jury believed he did, then also it was of no consequence, for, in that case, they couldn't have believed his denial nor had any faith in his explanations. They did not believe that he deposited it, and it can not be well said that this proof would have compelled a different belief. There was therefore no sufficient ground for a new trial. We find no material error in the record to the prejudice of appellant, and the judgment will be affirmed.

Jennie L. Bowman et al. v. John C. Wilson.

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1. SCANDALOUS AND IMPERTINENT MATTERS—*When Properly Stricken Out.*—Scandalous and impertinent matter in an answer relating to matters not within the cognizance of the court are properly stricken out on motion of the adverse party.

2. JUDGMENTS—*Power of Other Courts Over.*—Where a judgment is entered by confession in one county and nothing is made to appear to show a want of jurisdiction in the court of the subject-matter and per-

son of the defendant, the courts of another county have no power to question its validity.

3. SAME—*Obtained by Fraud*.—A court of law may set aside its own judgment obtained by fraud upon the court, but not for fraud practiced only upon the adverse party, where he has had his day in court, or opportunity to have it, or has waived it, and his adversary has obtained judgment upon competent and sufficient evidence, however false and fraudulent.

4. EQUITY PRACTICE—*Reaching Equitable Assets*.—An intervening petition in the nature of a creditor's bill, founded on the judgment of another court having unquestioned jurisdiction, where legal means of obtaining satisfaction have been exhausted, is properly addressed to a court having control of equitable assets arising from the sale of lands in partition, and of which the judgment debtors are entitled to distributive shares.

Intervening Petition.—Appeal from the Circuit Court of Greene County; the Hon. GEORGE W. HEEDMAN, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 21, 1895.

FRANK A. WHITESIDE, attorney for appellants.

If appellants had the right to bring an action in equity to set aside this judgment on the ground of fraud, surely where equity is invoked to assist in enforcing the judgment, they have the right to defend on the same ground. Higgins v. Curtiss et al., 82 Ill. 28, cited and approved in Anderson v. Hawke, 115 Ill. 33.

W. E. HUGHES, attorney for appellee.

Impertinence in its legal sense is defined to be “the introduction of any matter in a bill, answer or other pleading or proceeding in a suit which is not properly before the court for decision at any particular stage of the suit.” Story's Equity Pleadings, Secs. 266 to 270, inclusive.

“If matter is scandalous it is also impertinent. Scandal tends to injure the opposite party by making the record of a court the means of perpetuating libelous and malignant slander.” Daniell's Chancery Pleadings, Sec. 347; Story's Equity Pleadings, Secs. 269, 270.

Where a matter has been once heard and determined in a court of law, it can not be raised anew and reheard in a court

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of equity. *Cave v. Davis*, T. B. Monroe (Ky.) 392; *Hook v. Wood*, 3 Miss. (2 How.) 367; *Bumpass v. Reaves*, 1 Sneed (Tenn.) 595; *Gregory v. Burrell*, 2 Edwards' Chy. 417; *Miles v. Caldwell*, 2 Wall. 35.

A court of equity can not revise a judgment at law; the judgment must be held correct and conclusive until reversed in a court of appeal. *DeReimer v. Cantillion*, 4 Johns. (Chy.) 85; *Hollister v. Barclay*, 11 N. Y. 501; *Henderson v. Mitchell*, 1 Bail (S. C.) Chy. 113; *Cameron v. Bell*, 2 Dana (Ky.) 328; *Sawyer v. Moyer*, 109 Ill. 461.

The rule of *res adjudicata* applies not only to judgments rendered after litigation of the matter in controversy, but to judgments rendered on default. *Gates v. Preston*, 2 Hand (N.Y.) 113; *Newton v. Hook*, 48 N.Y. (3 Sickles) 676; *Gifford v. Thorn*, 9 N. J. Eq. 702; *Briggs v. Richmond*, 10 Pick. 391; *Green v. Hamilton*, 16 Md. 307; *Freeman on Judgments*, Secs. 330 and 532.

A defendant to a creditor's bill has no right to offer any evidence and therefore not to plead any facts tending to show that the debtor had been overreached in the transactions resulting in the judgment recovered at law. *Sawyer v. Moyer*, 109 Ill. 461.

A party against whom a bill had been taken as confessed can not assign as error that the proof does not sustain the allegation of the bill, it being a matter of discretion whether the court will require evidence to be produced. *Parke v. Brown*, 12 Brad. 291.

A decree *pro confesso* concludes a party to the extent of the averments in the bill. The defendant can not in such a case object to the sufficiency of the proof. *Brahm v. Dietsch*, 15 Brad. 335; *Starne v. Farr*, 17 Brad. 497; *Hammert v. Stempel*, 31 Ill. App. 553; *Johnson v. Donnell*, 15 Ill. 97; *Marsh v. Kauff*, 74 Ill. 191; *Benneson v. Bill*, 62 Ill. 408; *Koster v. Miller*, 149 Ill. 201.

The default admits the faults alleged, but not that the facts authorize the decree rendered. A part of the defendants here suffered a default, and they can not, therefore, be now heard to question the sufficiency of the evidence. *Wing*

v. Cropper, 35 Ill. 256; Thompson v. Dearborn, 107 Ill. 87; Boston v. Nichols, 47 Ill. 357.

When the defendant, by a default, confesses the truth of the allegations of the bill, no proof is required to sustain a decree based upon the allegations. Gault v. Hoagland, 25 Ill. 266; Stevens v. Vichell, 27 Ill. 444; Harmen v. Campbell, 30 Ill. 25; Manchester v. McKee, 4 Gilm. 517; Sullivan v. Sullivan, 42 Ill. 315; Cronan v. Frizell, 42 Ill. 319.

JOHN C. WILSON, *pro se.*

There are but two methods by which the judgment of a court may be attacked; these are, first, by direct attack, that is, an attempt to set it aside or correct it in some manner provided by law; and, second, by collateral attack. In a direct attack, the existence of the judgment is admitted, it being insisted that for some reason the judgment should be set aside or amended; in a collateral attack, the insistence is that the judgment is without effect, void, or, being voidable, has been made void by the party entitled to repudiate it. Cited: Chudleigh v. C., R. I. & P. Ry., 51 Ill. App. 490; Harmon v. Moore, 112 Ind. 221; Earle v. Earle, 91 Ind. 27.

When the court has jurisdiction, its judgment can not be collaterally impeached for any errors in law or any irregularities in practice. Cooper v. Reynolds, 10 Wall. (U. S.) 308; Wimberly v. Hurst, 33 Ill. 166; Graceland Cemetery v. People, 92 Ill. 619; Hendrick v. Whittemore, 105 Mass. 23; Bannon v. People, 1 Brad. 496.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

In certain proceedings in Greene county, at the suit of appellants against Andrew C. Bowman et al., for the partition of real estate, a decree was entered for the sale of the premises by the master in chancery, which was accordingly made for \$10,000. Appellee was solicitor for appellants, the complainants in those proceedings. Before the proceeds of the sale were ordered to be distributed, he made a motion for leave to file an intervening petition therein, and upon

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obtaining it, filed the one which is the foundation of this case.

It averred that on August 31, 1894, the petitioner recovered a judgment against appellants in the Superior Court of Cook County for \$848 and costs, on which execution was issued the next day and returned no property found; that appellants have no property in this State out of which the execution could be made, except their distributive shares in the proceeds of the sale under said decree in the hands of the master, who is not liable to be garnished at law; that his said judgment was upon a note of appellants, given upon an accounting between the parties on August 21, 1894, and was for his fees as solicitor of appellants in said partition case and of Andrew C. Bowman in the same, which they assumed to pay, and also for money lent and advanced by him for them at their request; that he has no sufficient remedy at law for the collection of said judgment, but has an equitable right to a lien upon appellants' distributive shares in the proceeds of said sale; and that the master in chancery has in his hands, of such proceeds, \$1,000, belonging to them. It prays for a rule on them and the master to answer under oath, and for a decree, on hearing, for a satisfaction of said judgment out of said fund, etc.

The answer of appellants did not deny the rendition of the judgment, or the issuance and return of execution thereon as alleged, but did deny personal knowledge thereof. It averred that if any such judgment was obtained it was without process against or other notice to them of the institution of any proceedings therefor; that they were able and willing to pay all just claims against them; denied that there was ever any accounting between the parties; that the respondents ever assumed to pay petitioner for any services as solicitor of said Andrew C. Bowman, or that they were indebted to him for money advanced for them or on any other account; averred that the court fixed the amount of his fees as solicitor for them in said cause, which was fully paid, and that he obtained the note on which the judgment, if any, was rendered, by representations so false and fraudulent and

acts so oppressive, that if true they could not be characterized with too much severity. But their allegation in this case was excepted to as impertinent and scandalous, and the exceptions were sustained. Thirty days were given to appellants in which to file sufficient answers. The rule was not complied with, but after the lapse of the time so given, and without any further answer in the same term, appellants by some means, in the absence of counsel for appellee, obtained an order of continuance; which, on motion of said counsel, as soon as it became known to them, and during the same term, was set aside, the default of appellants for non-compliance with the rule taken, and a decree made according to the prayer of the petition taken as confessed; from which this appeal was prayed and allowed.

Had the ignorance of appellants and the acts of fraud and oppression alleged in the answer been set forth to the court in which the judgment was rendered, upon a motion to open it and let them in to plead, we should have held that the matters excepted to were neither impertinent nor scandalous, constituting, as they did, the ground of the motion and being within the cognizance of that court.

But if they were not legally within the cognizance of the Circuit Court of Greene County, sitting in chancery, upon this petition, they were both impertinent and scandalous, and the exception thereto for those reasons was properly sustained.

We infer that the judgment of the Superior Court of Cook County was upon a note of appellants with a power of attorney to confess it, and as nothing appears by the answer to show a want of jurisdiction in that court of the subject-matter and the persons of the defendants, we think the Circuit Court of Greene County had no power to question the validity of its judgment. *Sawyer v. Moyer*, 109 Ill. 461.

It is truly said, generally, that fraud vitiates everything, judgments included, into which it effectively enters. But this is said only of fraud properly alleged and duly shown in a proper proceeding. A court of law may set

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aside its own judgment obtained by fraud upon itself, but not for fraud practiced only upon the adverse party, where he has had his day in court, or opportunity to have it, or has waived it, and his adversary has obtained judgment upon competent and sufficient evidence, however false and fraudulent. The court of law rendering it can not in such case set it aside or review it. Public interest requires that there should be an end of litigation. Errors of law or fact may be corrected by a court of review; and a court of equity, upon a proper showing by a defeated party, of newly discovered evidence which should produce a different result, unknown to him before or at the time of trial, without his fault, may award a new trial in the court of law; but we know of no authority or principle upon which the judgment of a court having jurisdiction of the subject-matter and parties can be otherwise attacked collaterally or be disregarded by any other, or even by the court which rendered it, except as to judgments by confession upon warrant of attorney, over which it is held to have an equitable control by virtue of which it may, upon a proper showing, let the defendant in to plead, leaving the judgment to stand as security for the outcome. We understand these propositions to be so well established and familiar as to require no extended citation of authority. They are largely referred to in the brief for appellee, and will, doubtless, be given by the reporter.

Here the intervening petition was in the nature of a creditor's bill, founded on the judgment of another court having unquestioned jurisdiction and the exhaustion of legal means of obtaining satisfaction, without effect, and was addressed to the only court having control of the equitable assets sought to be so applied. The defense attempted to be set up is that if the court which rendered that judgment had known the facts, it should not have rendered it. But it was rendered by express authority of appellants, upon their own note, which was apparently a valid and sufficient consideration for it. They had notice of it in ample time to apply to that court for relief by motion, but

did not avail themselves of the opportunity. For authority of the court below in effect to grant it in this proceeding counsel cite the cases of Higgins v. Curtiss, 82 Ill. 28, and Anderson v. Hawhe, 115 Ill. 33. The judgment in the first was an allowance by the County Court of a claim against the estate, and the court held that it was not conclusive against the sole devisee, and might be so attacked by her as fraudulent and inequitable; and in the other, the judgment was absolutely void for want of jurisdiction of the person of the defendant. These cases therefore do not controvert the rule declared in Sawyer v. Moyer, *supra*.

Perceiving no material error in the record the decree of the court below will be affirmed.

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Peasley & Co. et al. v. T. F. Weaver.

1. EXECUTION—*Without a Seal—Sales Under, Void.*—A sale of real estate under an execution having no seal is void, and such execution can not afterward be amended so as to render the sale valid.

2. ESTOPPEL—*To Deny the Validity of an Execution.*—A party litigant may enter a motion to stay an execution and otherwise treat it as a valid writ without being estopped from objecting to it upon his discovery that it is void.

3. SAME—*Elements of.*—An equitable estoppel is based upon a fraudulent purpose and a fraudulent result; where the element of fraud is wanting or where there is no deception followed by a change of conduct in consequence, there is no estoppel.

Motion to Vacate a Sale of Lands, under a void execution. Appeal from the Circuit Court of McLean County; the Hon. ALFRED SAMPLE, Judge, presiding. Heard in this court at the May term, 1895. Reversed and remanded, with directions. Opinion filed January 11, 1896.

I. N. PHILLIPS and A. W. PEASLEY, *pro se*, attorneys for appellants.

That the statute requires all process to be sealed with the seal of the court, see Starr & Curtis' Statute, chapter 37, paragraph 67: "Where the law expressly directs that

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process shall be in a specified form, such a provision is mandatory." *Ames v. Sankey*, 128 Ill. 523; *Sidwell v. Schumacher*, 99 Ill. 433; *Eagan v. Connelly*, 107 Ill. 466; *Ferris v. Crow*, 5 Gilm. 96. Void process can not be amended. *Bybee v. Ashby*, 2 Gilm. 151 and 167; *Durham et al. v. Heaton*, 28 Ill. 264; *Sidwell v. Schumacher*, 99 Ill. 427.

A sale of land under an execution that is not under the seal of the court is absolutely void, and may be successfully resisted in any kind of proceeding, or in any forum in which the question may arise. *Davis v. Ransom et al.*, 26 Ill. 100, 107; *Sidwell v. Schumacher*, 99 Ill. 427; *Hernandez v. Drake*, 81 Ill. 35; *Roseman et al. v. Miller*, 84 Ill. 297; *Bunn et al. v. Gardner*, 18 Brad. 94; *Baldwin v. Freydendall*, 10 Brad. 111; *Huls v. Buntin*, 47 Ill. 396.

The execution being void, all acts performed under it are void, and no rights can be divested by it or acquired under the same. *Coal & Mining Co. v. Coal & Mining Co.*, 111 Ill. 38; *Myer v. Mintonye*, 106 Ill. 420; *Brown v. Parker*, 15 Ill. 308; *Borders et al. v. Murphy*, 78 Ill. 86; *Durham et al. v. Heaton*, 28 Ill. 271.

EDWARD BARRY, attorney for appellee.

The omission of the seal was a mere clerical error, a misprision of the clerk, and the court should have allowed the amendment. Whatever may be said by courts in ejectment cases where the question of amendment does not arise, the great weight of authority is to the effect that the execution should be amended by attaching seal. It is an error of form and not of substance. *Freeman on Executions*, Sec. 46; *Bridewell v. Mooney*, 25 Atk. 524; *Taylor v. Courtney*, 15 Neb. 190; *Dever v. Aiken*, 40 Ga. 429; *Corwith v. Bank*, 18 Wis. 560; *Sabin v. Austin*, 19 Wis. 421; *People v. Duning*, 1 Wend. 16; *Dounice v. Eacker*, 3 Barb. 17; *Arnold v. Nye*, 23 Mich. 286; *Sawyer v. Baker*, 8 Greenleaf 29; *Purcell v. McFarland*, 1 Ired. 34.

A motion to stay an execution is a confession of the validity of the judgment. After a motion to stay, defendants are estopped to show that the judgment is void. *Anderson*

v. Kimbro, 5 Cald. (Tenn.) 260; Tifts v. Keaton, 2 S. E. (Ga.) 690.

Void judicial sales may be ratified and parties estopped from questioning the same. The application of this doctrine does not depend on any supposed distinctions between void and voidable sales. They are an exception to the rule that that which is void can not be ratified. Freeman on Void Judicial Sales, Sec. 50; Fallen v. Worthington, 22 Pac. Rept. 962; Maple v. Cussard, 53 Pa. St. 348; Johnson v. Fritz, 44 Pa. St. 449; DeLord v. Mercer, 24 Ia. 118; McConnell v. People, 71 Ill. 481; Johnson v. Cooper, 56 Miss. 608.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This was a motion filed by appellants, defendants below, on the 20th day of October, 1894, to set aside and vacate a sale of lands under execution upon a judgment against them in favor of appellee, at which he became the purchaser for the amount of his judgment and the costs.

It was based on two grounds; first, that the execution was void for want of a seal; and second, that the return showed a sale of the lands in mass, without showing that the individual, but undivided interests of the defendants therein, or that the several tracts thereof were first offered separately or in parcels.

The facts alleged being apparent from inspection of the writ and the return, the plaintiff entered cross-motions for leave to the sheriff to amend his return, and to the clerk to amend the writ by affixing the seal thereto. Of these cross-motions the first was allowed, but the second overruled, as was also the original motion; which overrulings were by the parties respectively excepted to and are here assigned for error.

However it may be as to mesne process, before judgment and upon a direct application to amend, we are clearly of opinion that whether the want of a seal to final process upon which property is sold makes it absolutely void and

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not amendable upon any application, is no longer an open question in this State; and therefore the decisions in others and the opinions of text writers upon it as an original question, are not for us to consider.

In *Sidwell v. Schumacher*, 99 Ill. 427, after noticing nearly all of the preceding cases on the subject, the court said that “the present review of the authorities clearly warrants the conclusion that a sale of land under an execution that does not run in the name of the people, that is not sealed or is not signed by or directed to the proper officer, is absolutely void, and may be successfully resisted in any kind of a proceeding, or in any forum in which the question may arise.”

It is true, as suggested by counsel, that in that case and in most of the others cited for appellants, the power to amend was not in question, and the decisions were only that process so defective would not support a claim of legal title made under it, in the very technical action of ejectment which respects only such; and true, also, as was said in *Commissioners, etc., v. Barry*, 66 Ill. on page 498, that it “is not uncommon to confound void with voidable, and to term void that which is only voidable.” In the *Sidwell* case, however, the court was clearly not unmindful of these suggestions, and to avoid the not uncommon confusion noticed, deliberately qualified the term “void” by the strongest word it could employ for the purpose manifestly intended—“absolutely”—which *Worcester* defines as “completely; in the fullest sense; without condition, limitation, relation or dependence.” We apprehend that it is very uncommon for courts of last resort to term “absolutely” void that which they understand to be voidable only. Some of the earlier cases held that mesne process, void on its face by reason of what was assumed to be misprision of the clerk, might be amended upon application before judgment; but if it was ever held that void final process on which sale had been made could be amended by “any kind of proceeding, or in any forum,” of which we are not advised, we think it overruled by *Sidwell’s* case and others later, cited in *Ames v. Sankey*, 128 Ill. 523.

But it is further claimed that appellants are estopped to assert the invalidity of this unsealed writ.

It appears that on the 18th of March, 1893, being of the February term of the court below, appellee obtained a judgment against Peasley & Co., as a firm, and on the same day another against the firm and Hannah Peasley. On the 20th, in the same term of the same court, the Third National Bank of Bloomington obtained another against the same defendants last named; upon each of which, respectively, execution was immediately issued and levied upon the personal property of the firm alone. As a firm it owned no real estate. On the 23d of the same month upon a bill filed by said firm for that purpose, a receiver was appointed to take charge of its assets, with the consent of these judgment creditors and by an order of court which preserved their rights therein; and the sheriff turned over to him the property so levied upon. By the 30th of August this property had been sold by the receiver, but did not realize enough to pay the first of Weaver's judgments. All of the executions being then *functus*, he ordered the one issued on his second judgment returned *nulla bona*, and on September 1st, sued out the *alias* thereon, which is the writ here in question, and had it levied upon the individual interests of the defendants in the lands referred to, which were advertised to be sold on Nov. 28, 1893. Thereupon a controversy arose between the bank and Weaver as to their respective rights in the proceeds of these lands, upon the petition of the bank filed in the receiver case on November 13th, denying the priority claimed by Weaver; to which the latter and these appellants were made parties. A demurrer thereto by Weaver was sustained in part, and the respondents ruled to answer as to the rest. Weaver answered but these appellants did not. The matter was heard on a stipulation as to the facts, made by Weaver and the bank, but not by appellants, and the court held that all the executions should share *pro rata* in those proceeds, and ordered Weaver, who had purchased at the sale made in the meantime for the amount of his second judgment and costs, to pay to the bank its *pro rata* share. From that order

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Weaver appealed to this court, which reversed it for reasons stated in the opinion filed. *Weaver v. The Bank*, 56 Ill. App. 664.

Before the sale was made appellants entered their motions, first, in the receiver case, to stay the execution, and afterward in the law case to stay the levy and sale, until the receiver could complete the disposition of the assets in his hands and make distribution of the proceeds. Both of them were denied and the orders denying them entered of record before the one here in question was filed.

It does not appear on the face of either, nor is it claimed that on their hearing any attack was made on the execution itself for the defect therein or otherwise. They were rested on the allegations that Weaver had consented to the appointment of the receiver, into whose hands had come a large amount of the firm assets in addition to the tangible property levied on and turned over by the sheriff; that he had distributed and reported in part only; that the firm was the real debtor, and that the assets when converted would probably suffice to satisfy all of the judgments, and should be first applied thereon. The sale of the lands was advertised to be made on November 28th, and it was not until the 27th that the last of these two motions was heard. The execution was not produced on the hearing. That it had no seal was a fact not brought to the notice of the court, and seems not to have been observed by any of the parties. Its validity was not adjudicated nor referred to.

But it is claimed that the failure of appellants then to attack it and their submission to the orders denying their motion to stay it, and to stay the levy and sale under it, operate as an estoppel *in pais* against the present attack.

There is no evidence of any fraudulent intention in these proceedings on the part of appellants, nor is any such charged. To constitute an equitable estoppel, then, there must have been some misleading act or declaration which naturally induced some conduct or change of conduct on the part of appellee that he otherwise would not have pursued or made, and to his wrong and injury—in other words, an effect or

consequence of allowing them now to assert the invalidity of the writ which would be fraudulent and unjust as to him. *Hill v. Blackwelder*, 113 Ill. 283; *Robbins v. Moore*, 129 Id. 30, and cases there cited.

It is said that by the motions to stay, the validity of the writ was assumed and the assumption acted upon by appellants with the knowledge that appellee was relying upon the execution to satisfy his judgment, and that he was thereby misled into a waiver of his right to participate in the receiver's distribution and to incur the costs to the sheriff for making the sale. Which is to say that the party whose writ it was, who sued it out, whose duty and interest required him to know whether it was valid, and to whom the means of knowledge were at least as ample and open as to appellants, who ordered its levy, asserted its validity, declared his purpose to have it executed, and persistently pursued it—all before these motions to stay it were made, against opposition by the bank and without the slightest encouragement from appellants—was misled by these motions to believe what he had all along been asserting and never doubted, and consequently to waive rights and incur costs. In view of his previous conduct it can not be supposed that but for these motions he would have dropped his writ, taken his dividend and saved his costs. From all the circumstances shown, it seems clear that in the matter of deception, as between these parties, appellee was the leader and not the led. And he misled, no doubt ignorantly and honestly, but none the less really. It was not appellants' assumption, by their motions, of the validity of the writ, that induced appellee to waive any right or incur any liability, but his assertions and action in relation to it that induced and warranted that assumption and the motions made upon it. He waived his dividend and incurred his liability to the sheriff upon his own independent belief that his execution was regular, and a more certain and sufficient security for the payment of his judgment than the assets in the hands of the receiver. Appellants did him no wrong, by action or omission, in assuming the situation to be as

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he so asserted, and acting accordingly. Whatever their own interest might have prompted or required them to do, they owed him no duty to examine the writ and inform him that it was without a seal. Their interest and position were openly adverse to his. He did not rely on them for information or advice respecting his own proceedings. They did not positively misrepresent anything, or conceal anything, or even in any way assume anything concerning his writ that he did not previously assume and continuously insist on. Whatever loss he has sustained in the premises is due to his own neglect or oversight, wholly uninfluenced by any act or omission of appellants.

Upon the authority of the cases on that point already referred to, and that of Holcomb v. Boynton, 151 Ill. 294, we are of opinion that the record here presents no element of an equitable estoppel or of any adjudication which should have prevented the allowance of the original motion. It is therefore unnecessary to consider the rulings on the cross-motions.

For the error indicated the judgment will be reversed and the matter remanded, with directions to vacate and set aside the execution and sale.

Reversed and remanded with directions.

George W. Elliott v. W. A. Knight, Adm'r, etc.

1. PARTIES—*Amendments as to.*—Our statute recognizes the rule that an action should be brought by the party in whom is the legal right, but allows amendments in cases of mistake by substituting the party legally entitled, without limitation as to the time when his right accrued.

2. RENT—*Action for, Between Co-tenants.*—The rule that an action between co-tenants will not lie for rent does not apply where there is a contract to pay rent.

3. RECOVERY—*In Excess of the Amount Indorsed on the Summons.*—A recovery for an amount greater than the sum indorsed on the summons is lawful where the excess is for interest accrued since the commencement of the suit.

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Action for Rent.—Appeal from the Circuit Court of Christian County; the Hon. JACOB FOUBE, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 6, 1895.

J. E. HOGAN and J. L. DRENNAN, attorneys for appellant.

JAMES M. TAYLOR and JAMES B. ABRAMS, attorneys for appellee.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This action was commenced before a justice of the peace against appellant for rent of an undivided interest of the deceased in certain land. The case was tried on appeal without a jury and judgment rendered for the plaintiff for \$177.59 on January 3, 1895. The summons, with the name of William A. Knight as plaintiff, and \$171.90 indorsed as the amount demanded, was issued August 18, 1894, and the trial was had, after several continuances by agreement, on the 17th of September following. In the mean time, on the 15th of September, letters of administration on the estate of the deceased, who died April 20, 1894, and was at that time the wife of said William A. Knight, were duly granted to him; and when the cause was called for trial the summons, on his motion, was amended by inserting after his name the words "administrator of Frances Knight, deceased."

It appears that the deceased and John B. Wood owned the land in unequal undivided interests. On the 28th of January, 1890, her guardian, as such, executed to Wood a lease of her interest from March 1, 1890, to March 1, 1894, for \$3.25 per acre per annum, payable in two equal installments of \$52.10 on the 1st of September and January respectively during the term, with interest at the rate of eight per cent per annum after due until paid. Wood paid the rent for the first year and then sold all his interest, leasehold and other, to the appellant, but without assigning the lease, and moved away. Appellant paid whatever was thereafter paid, on account of the rent, to the guardian until his ward became of age and he was discharged, which was

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in October, 1893. In that month she intermarried with appellee, and thereupon they joined in a quit-claim deed to appellant of her interest in the land, but with an express and very careful reservation of her right to the rent according to the lease. Mr. Whaley occupied the land for a year and a half or more next before the expiration of the term, in what character was not positively shown, but presumably under appellant, who paid to the guardian the entire rent due for the second year, and to appellee the installment due September 1, 1893. To both he expressly acknowledged his obligation to pay the rent required, and as required by the lease, and he himself wrote on it the indorsement of the payment last made.

It was testified that three of the installments, with all the interest thereon, remained unpaid, being those due respectively on September 1, 1892, January 1, 1893, and January 1, 1894. The guardian testified to all that were received by him, which were also shown by his verified report in evidence, and appellee to the only one paid to him. This evidence rebuts any presumption of the payment of those due earlier that might otherwise arise from the payment of any due later.

Appellant offered no evidence on his behalf, but insists on several alleged errors as requiring a reversal of the judgment.

First, in the allowance of the amendment of the summons, by substituting as plaintiff a party not in being when the suit was commenced. Reliance is had upon a quotation from Bouvier's Law Dictionary, made by the court in *Parker v. Easlow*, 102 Ill., on p. 276, as follows: "By this phrase (cause of action) is understood the right to bring an action, which implies that there is some person in existence who can assert, and also a person who can lawfully be sued. * * * There is no cause of action until the claimant can legally sue." The case was a suit upon a note given in compromise and settlement of a claim for personal injury. An instruction was given for the plaintiff upon the hypothesis, among others, that he in good faith supposed he had "a cause of action," and the court was answering an objection that it did not say a good cause of action, which it

held to be untenable. There was no question as to the person of the plaintiff, nor any reference, or occasion for reference to our practice act, authorizing amendments. The rule unquestionably is that suit should be brought by the party in whom is the legal right. Our statute recognizes it, but allows amendment, in case of mistake, by substituting the party legally entitled, without limitation as to the time when his right accrued. In a later case, where the action was brought by the assignee of a life policy, beneficially interested, in her own right, and the judgment was reversed for want of legal right to sue, letters of administration were issued after remandment, and judgment in favor of such administrator, substituted as plaintiff by amendment, was affirmed upon the authority of the statute. U. S. Ins. Co. v. Ludwig, 108 Ill. 514. This seems decisive of the question here made.

Second, that the deceased and the appellant were co-tenants, and therefore as between them or their representatives an action in debt or assumpsit, for rent, would not lie. Without conceding that these parties were co-tenants, we hold that the facts stated and proved would bring this case within the well established exception. They clearly show a contract to pay rent. Boley v. Barutio, 120 Ill. 192.

Third, that the amount of the judgment exceeded that of the demand indorsed on the summons. But the excess is less than the interest accrued after suit brought, and its recovery was therefore allowable. Welch v. Karstens, 60 Ill. 118.

Neither of these alleged errors touches the merits of the case.

Judgment affirmed.

Emeline Dugan v. Laura E. Daniels, Executrix.

1. NEW TRIALS—*In Courts of Equity*.—Courts of equity grant new trials in no case except on clear and satisfactory proof by evidence of a conclusive or decisive character which upon a new trial would produce a different result.

Dugan v. Daniels.

Bill for New Trial.—Appeal from the Circuit Court of Greene County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 6, 1895.

J. S. CARR, attorney for appellant.

O. B. HAMILTON, attorney for appellee.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

The matter here in controversy is a claim filed in the County Court, September 23, 1893, by appellant against the estate of Frances Milton, her mother, for \$5,876. On hearing there it was disallowed, and likewise on her appeal taken to the Circuit Court, from which judgment no appeal was prosecuted; but on August 28, 1894, five months after it was rendered, the bill herein was filed to obtain a new trial on the ground of newly discovered evidence. On final hearing upon the pleadings and proofs a decree dismissing it was entered, and thereupon this appeal taken.

The substance of the bill is that about July 1, 1872, the testatrix was justly indebted to complainant in the sum of \$2,600, for rent of her real estate and for moneys and property of said complainant, had, received and appropriated by said testatrix to her own use; that complainant, then intending and having made preparation to commence suit for the recovery thereof, the testatrix requested her not to do so and promised that in that case she would pay it by legacy in her will; and that complainant accepted said promise and relying upon it, did not bring the suit; the testatrix died August 11, 1893, leaving a will, which has been duly probated and by which she bequeathed to complainant the sum of \$1,000, and nothing more; that this was not intended as a payment in whole or part of said sum of \$2,600, and that she never did pay it or any part of it or make any provision for its payment; that there never was any written or documentary evidence of the claim, and the only evidence introduced by complainant on the hearing or trial to prove

it was the oral testimony of John Dugan, her husband, which the Circuit Court ruled out on the ground that he was not a competent witness; that before and after the filing and each trial of her claim she used every effort in her power to find proof, and sought for and questioned every person she could have any reason to suppose might have any knowledge concerning it, but without success; that those she knew could have substantiated it were all dead; and so she submitted it to trial with the conviction that there was no living witness by whom she could prove it except her husband, and upon the advice of counsel that he was competent. But after the close of the term at which the judgment of the Circuit Court was rendered and the fact and result of the trial had become publicly known and generally talked about in the county, by mere chance, in the course of conversation about it, she learned of five persons (named) who knew that Frances Milton was indebted to her in the sum of \$2,600, and who will testify, if a new trial shall be granted, that she admitted said indebtedness and that in consideration of complainant's forbearance to sue her for it she promised complainant to make it good to complainant at her, said Frances', death, by legacy in her will.

The bill was sworn to, and on demurrer was afterward amended by appending thereto the affidavits of four or five persons named as newly discovered witnesses. The answer denied all the allegations relating to the merits of the claim.

Complainant gave the names of twenty-five of whom she had in person made inquiry, and stated that she had written to others, respecting their knowledge of the claim, but none of them had any. The five referred to, however, testified to separate verbal admissions made by the testatrix to them or in their hearing respectively. With one exception these were all long past—from eight to twenty-two years, and with one other, all in the course of casual conversation which the witness had never mentioned until after the trial below. In two of these no amount was stated nor anything said of a will. A third was flatly contradicted by the only person living of those who were said to have been

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present on the occasion. A fourth put the amount at "between \$2,500 and \$2,600, somewhere along there; part of it was rent money that was coming to Mrs. Dugan; two different times, somewhere about \$600 is what she told me." There were other amounts stated which he couldn't remember. This was in December, 1861.

The fifth was a conversation in complainant's sitting room between her and her mother, overheard by the witness, who was in the kitchen adjoining. Complainant threatened to sue for \$2,500 or more, and her mother begged her not to do it. After hearing all he cared to, he took a cup and went out to the well. While there Mr. Dugan returned from town and they went to the kitchen together. Dugan stepped to the open door and told his wife he hadn't brought the suit, and why. Mrs. Milton asked him whom he was going to sue, and he answered, "you." She then asked him how much they claimed, and he said \$2,500 or better, upon which she made the promise alleged in the bill, and complainant expressly accepted it. The witness was working for Dugan and talked with him "lots of times" about the conversation between the women. Dugan knew he was in the kitchen from the time he came back from the well, after which the conversation was continued for some time. The witness was there until Mrs. Milton left. He unhitched her horse for her. After she came out of the house she repeated the promise. Complainant then said, "Now you hear that, don't you, John?" and the witness, whose name was John, answered "Yes." It is claimed that this question was intended for her husband, but enough appears, aside from that, to raise the question of *laches* as to that witness. For it is apparent that the claim must have been based on what is alleged to have occurred on that occasion. Mrs. Milton was then first impressed with the idea that there was an actual intention on the part of complainant to commence a suit against her at once, which could be averted only by some definite arrangement, and then the definite promise was made and the condition expressly agreed to by complainant. If it had been made before, there was no oc-

casion for it then, and if then, none afterward. The bill states it as made "on or about the first day of July, 1872," and the witness fixes the time of this conversation as "in the summer of 1872, just before harvest." Neither complainant nor her husband could well have forgotten that this witness was there and would probably know something about it. That in searching for some one by whom to prove it, under the pressure of such a necessity, they never once thought of their hired man, who was in the kitchen at the time, with the middle door into the sitting room open, who unhitched her mother's horse when she left, and responded to her appeal to bear witness to the alleged promise, is a circumstance that may cast some suspicion upon the good faith of a claim based upon it. Both have seen and talked with him about it since the trial, and now, twenty-two years after the conversation, in which he had no interest and has never mentioned since about three days after it occurred, he recalls distinctly just enough of it to fit and support the allegation of the bill, and attempts to give the words in which the material parts of it were expressed.

It was essential that appellant should prove a promise to pay by legacy. Mere admission of indebtedness and declaration of intention to pay in that way would not suffice against the statute of limitations. There must be a promise, founded on sufficient consideration, to pay a sum certain, or one that could be made certain, or at least a definite minimum. Witnesses, such as were introduced, might understand a mere admission of indebtedness as a promise to pay. Only two show a definite minimum, of whom one was directly contradicted as to his entire statement of what the deceased said. No two heard the same statement, and neither had the slightest interest in it when made, and many years had elapsed to dim their recollection.

Mrs. Milton lived for more than twenty-one years after the alleged promise, and it might well be expected that even a daughter and a son-in-law who could threaten and prepare to sue her, would have required better evidence of the promise and better security for its performance, which might be

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so long deferred, than mere words spoken, and especially if spoken, as they understood, only in the presence of those who would not be competent to prove them.

But however difficult it may be to account for this testimony, except upon the supposition of its truth, it is no less difficult to account for its truth in view of the evidence on the part of the appellee, which seems to show beyond controversy that neither in 1872 nor at any time afterward was Mrs. Milton indebted to the complainant in any amount whatever, and must have known it. From the records of the County Court and recorder of deeds of Jersey county the facts appear as follows:

The parties are half-sisters—daughters of the testatrix. Her first husband was George W. Fitzgerald, who died Oct. 19, 1851, leaving his widow, and Caroline, Emeline (the appellant) and George W. his only children and heirs at law. The inventory of his estate shows eighty acres of land, and personal property appraised at \$702.95—no more. The widow's award was \$386, leaving \$316.95 to be applied to funeral expenses, costs of administration and debts. Of what remained, if anything, the widow was entitled to one third, and the children, in equal parts, to the balance.

On April 8, 1854, Henderson Benson, their grandfather, was duly appointed guardian. He died December 4, 1861, and letters of administration upon his estate were granted to Robert F. Benson and George E. Warren.

The widow was married March 18, 1853, to Charles Milton, who, on January 21, 1862, was appointed guardian of the three children of Fitzgerald. On February 17, 1862, a claim was allowed against the estate of Benson, the former guardian, in favor of the wards, of \$1,000.26, and the report of the administrators shows its payment in full (\$1,054.26) to Charles Milton, guardian, January 8, 1863.

Report of Charles Milton, guardian, of February 17, 1864, shows his receipt of it, and a balance due the wards, in his hands at that date, of \$1,952.50.

Appellant attained her majority November 4, 1868, and very soon thereafter was married to John W. Dugan. The

report of Charles Milton of February 20, 1869, shows the total amount then in his hands, as guardian, belonging to the three children, was \$2,370.04; settlement with appellant, and payments to her, for which she gave him her receipt, covering payment of \$95 in June, 1866; \$20 in October of the same year; \$376.56 in December, 1867, and \$433.80 in January, 1869, the last being expressed to be "in full of my share of the money in his hands, belonging to Caroline, George W. and the undersigned," which was duly approved by the County Court.

On January 29, 1869—nearly a month before—being then of full age and married, appellant and her husband conveyed to Charles Milton her undivided one-third interest in the eighty acres of which her father died seized, for \$1,800, reserving a vendor's lien which was canceled upon payment in full in January, 1871.

Her mother's dower in that farm was not assigned until September 6, 1859. It was shown by the testimony of Joseph W. Fitzgerald, a brother of appellant's father, who lived on an adjoining farm, that the widow with her children, including appellant, all lived on the eighty acres, as a family, from the time of her husband's death until appellant was married.

Counsel has omitted from the abstract all the particulars of the accounts and reports of the guardians and administrators, giving only those above stated, for the reason assigned that appellant's claim is for an indebtedness admitted by the testatrix after they were rendered and approved. But no attempt was made to show when, where or how, or on what account it arose, except that one witness said "part of it was rent money that was coming to Mrs. Dugan, two different times—somewhere about \$600 is what she told me;" and one other that "she talked over, that she hadn't paid Emmy all the Fitzgerald estate."

It does not appear that anything was due her from the personal estate, nor is it at all probable, from the amount inventoried and allowance for widow's award, the correctness of which is not questioned. Appellant's then possessory

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interest in the realty was not more than eighteen acres—one-third of two-thirds of eighty. Her own receipt shows that she has been paid what would amount to about \$3 per acre, from the date of her father's death until she sold and conveyed all of her interest in it, although her mother's dower was not assigned until nearly eight years after her husband's death. A guardian was appointed within two and a half years, who might have had it assigned sooner, but we can not say that his failure to do so was against the interests of his wards. Their step-father might have reasonably claimed that their interest in the rent should be applied toward their support, which was derived in part from his labor on the land; and yet their guardian's estate paid them \$1,000 for what he received for them from some source, in less than eight years, or until the dower was assigned. A witness for appellant testified that he was told by the first guardian and by Mrs. Milton that he rented the land to her; but on cross-examination said the arrangement, as they stated it, was that she "was to have the place to maintain the children until they became twelve years of age, and after that he was to take it and charge her for rent."

All this evidence, documentary and oral, was competent and pertinent to the question whether the alleged admissions of indebtedness were in fact made. If the fact was that she was not so indebted and knew she was not, the inference is strong that there was some misunderstanding or dishonesty on the part of the witnesses who testified to them, and if they were made as testified, are not binding. Those claimed were said to have been made to different witnesses, separately and alone; neither directly corroborates any other, or had any interest in the matter to attract their special attention to what was said. They were casually made, a long time before, by a person whose lips are sealed and can not contradict or explain. According to their statements, no other contradiction but proof as to the fact said to have been admitted was possible, because no other person, competent and living, was present (except in one instance, where direct

contradiction was made). It is to be noticed, also, that the claim in controversy is not based upon an alleged settlement by compromise of a doubtful one, but upon the allegations of an absolutely valid and subsisting indebtedness, which makes its validity, and not the admissions, which are but evidence of it, the vital question.

Two trials of it have been had with the same result. Whether the husband was admitted as a competent witness on the first does not appear; but if his exclusion on the last was a surprise (which it ought not to have been in view of repeated decisions of the Supreme Court in *Shaw v. Shoonhoven*, 130 Ill. 455, and the two other cases there cited) appellant should have taken a non-suit.

Courts of equity grant new trials in courts of law in no case except on clear and satisfactory proof (*T., W. & W. Ry. Co. v. Ingram*, 85 Ill. 173), by evidence of a conclusive or decisive character (*Woodside v. Morgan*, 62 Id. 283), which upon a new trial would produce a different result (*Coalsen v. Leitch*, 110 Id. 508).

We do not believe that the testimony of the newly discovered witnesses in this case can, would or should produce that effect. The record evidence shows that the testatrix was not indebted to appellant, whatever she may have said, and probably never said what is attributed to her. The indebtedness rather appears to have been the other way. For her will, dated July 27, 1893, only a fortnight before her death, and long after her husband's estate was settled and appellant formally acknowledged the receipt of all she was entitled to receive from it, bequeathed to appellant, as her "beloved daughter," \$1,045, consisting of one promissory note of Oct. 5, 1892, for \$360, payable to her order and signed by John W. Dugan and appellant, his wife; one other note of April 2, 1892, for \$85, payable one day after date to her order, and signed by John W. Dugan; and \$600 in money.

For the reasons stated we are of opinion that the decree dismissing her bill was right, and it will be affirmed.

County of Madison v. Halliburton.

County of Madison v. William H. Halliburton.

1. **COUNTIES—Liability for Medical Aid to Persons not Paupers, etc.**—The fact that a county physician is under contract to treat the county poor at a stated salary does not preclude him from recovering for services rendered to persons (not paupers) injured by an explosion and requiring immediate medical aid.

Assumpsit, for medical services. Appeal from the Circuit Court of Jersey County; the Hon. GEO. W. HERDMAN, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 6, 1895.

E. B. GLASS, state's attorney, and **KROME & TERRY**, attorneys for appellants.

HENRY S. BAKER, JR., and **ALEXANDER W. HOPE**, attorneys for appellee.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This is a companion case to that of the same appellant vs. William A. Haskell, in which an opinion has been filed. The only difference between them claimed to affect the question of appellant's liability is that at the time of the Wann disaster, and during all the time of treatment of the victims in the hospital, appellee was the county physician at an annual salary which was duly paid. He testified, however, that his contract, which was verbal, covered the cases of the county "poor" only; that he so claimed to the supervisors of the two townships, who concurred in his understanding that it did not embrace those here in question, and we think the court was fully warranted by the evidence in so finding.

Appellant furnished no materials, and therefore the judgment was for \$532.60, being less than Dr. Haskell's by just the cost of the materials furnished by the latter. Judgment affirmed.

Wm. Copeland, Elizabeth Lamm and Emily Wait v. A. G. Copeland et al.

1. **WILLS—Construction of a Residuary Clause.**—Where a testator who left as his heirs, children, grandchildren and great-grandchildren, descendants and heirs of other of his children, deceased, respectively, provided that the residue of his estate should be equally divided among all his lawful heirs, it was held that such heirs took *per capita* and not *per stirpes*.

Bill to Construe a Will.—Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 6, 1895.

E. R. E. KIMBROUGH and JAMES A. MEEKS, attorneys for appellants.

A bequest of an estate “to be divided equally among all heirs at law,” not naming them, has reference to the statute of descent, and the heirs will take *per stirpes*, as in cases of intestacy. *Richards v. Miller*, 62 Ill. 417; *Kelly et al. v. Vigas et al.*, 112 Ill. 242; *Daggett v. Slack*, 8 Metc. 450; *Tillinghast v. Cook*, 9 Metc. 146; *Rand v. Sanger*, 115 Mass. 124; *Bassett v. Granger*, 100 Mass. 348.

This rule of construction, however, will yield to a very faint glimpse of a different intention in the context. *Jarman on Wills*, 5th Am. Ed., Vol. 2, p. 757; *Kelly et al. v. Vigas et al.*, 112 Ill. 245.

There is a difference in designation as children or heirs of one. If the gift is to the children of A and of B, they take *per capita*. *Lady Lincoln v. Pelham*, 10 Wis. 166; *Pitney v. Brown*, 44 Ill. 366; *Barnes v. Patch*, 8 Ves. 604; *Walker v. Moore*, 1 Beav. 607; 2 *Jarman on Wills* (5th Am. Ed.), 756.

SALMANS & DRAPER, attorneys for appellee Nancy Judy, contended that the words “equally” or “share and share alike,” or “to be equally divided,” import an intention.

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When they are used in a will they mean a division *per capita*. *Richard v. Miller*, 62 Ill. 425; *Pitney v. Brown*, 44 Ill. 363; *Rawson v. Rawson*, 52 Ill. 62; *Gauch v. Ins. Co.*, 88 Ill. 253; *Daggett v. Slack*, 8 Metc. 453.

LAWRENCE & LAWRENCE, attorneys for appellees William Courtney, Samuel Courtney, Charles Courtney, and Eva Copeland.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Appellants filed the bill herein for the construction of the will of Samuel Copeland, their father, which was as follows:

“I give and bequeath to my children now living, William H. Copeland, Perry Copeland, Andrew G. Copeland, Emily Wait and Elizabeth Lamm, share and share alike. Andrew G. Copeland having previously received \$4,359.28, as shown by receipts, vouchers and book account, and now wishing to make my other children, named above, equal in heirship; and whereas, William H. Copeland having previously received \$1,220, I now give and bequeath to him \$3,139.20. Perry Copeland having previously received \$3,598.50, I now give and bequeath to him \$760.78. Emily Wait having previously received \$1,445, I now give and bequeath to her \$2,914.28. Elizabeth Lamm having previously received \$3,195, I also give and bequeath to her \$1,164.28. This making all my living children above named to share and share alike up to this date. And I hereby direct that after the above conditions are complied with I further direct that after my decease all my debts of every kind and character shall be paid. Then the residue of my estate to be equally divided among all of my lawful heirs.”

Besides the children named, the testator left as his heirs several grandchildren and great-grandchildren, descendants and heirs of other of his children deceased, respectively.

The sole question to be determined by the construction sought is whether as to the “residue” of his estate they take *per stirpes* or *per capita*; and the court below holding the latter, decreed its distribution accordingly.

We see no material difference between this case and that of *Best v. Farris & Wall*, 21 Ill. App. 49, in which this court so construed a similar testamentary provision, and for the reasons there stated the decree here will be affirmed.

Cleveland, C., C. & St. L. Ry. Co. v. Oscar Bonnett.

1. **VERDICTS—When Conclusive.**—When, by the instructions given, the issue is clearly presented to the jury, and the law applicable to the case, upon the evidence, fully and fairly stated, the verdict must be held as a settlement of the matter.

Action for Killing Domestic Animals.—Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 6, 1895.

F. Y. HAMILTON, attorney for appellant; JOHN T. DYE, of counsel.

WELTY & STERLING, attorneys for appellee.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

On appeal from a justice of the peace appellee obtained a verdict and judgment for \$118, being for three steers that got on appellant's railroad through defect of fence, and were killed by a freight train, and for attorney's fees for services in both courts.

Appellee lived on a farm two miles southeast of LeRoy, with a pasture leased of his father, extending sixty rods along and adjoining the right of way. On the afternoon of June 28, 1894, appellant's servants took out the fence between them for the purpose of building a new one, but went no further than to put in the new posts and nail on two wires on that day. During the following night the steers escaped and were killed.

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The only question presented by the record is whether appellee had agreed with appellant's fence foreman, or given him fairly to understand that he would take his stock out of the pasture for that night. Upon that question there was a conflict of evidence. The foreman's testimony was in substance, that on the morning of the 27th he met appellee's father in LeRoy, and supposing that he occupied the pasture, told him they were coming on the next day to build him a new fence, and as they might not finish it in one day the stock should be removed, to which Mr. Bonnett replied that his son occupied it, but he was going out there that evening and would have them remove it; that on the afternoon of the next day they went out for that purpose; that about four o'clock he walked out into the pasture to see if any stock was there, but it was rolling and part in thicket, so that he couldn't see all over it. However, he saw no stock there. There was also evidence tending to prove that on the next morning appellant, at the place where the steers were killed, admitted in the hearing of several persons that his father had notified him that they would build on the 28th. Mr. Bonnett, Sr., testified that the foreman said they were coming to build in a day or two, but did not fix the day; that he so told appellee, who then said he could take the stock out for one night if they notified him when they would put up the fence.

Appellee corroborated his father as to what the latter told him, and stated that about nine or ten o'clock in the morning of the 28th he went into the pasture to salt the stock, and seeing nobody about the fence did not go again that day. He positively denied the alleged admissions.

By the instructions given the issue was clearly presented, and the law applicable to the case upon the evidence fully and fairly stated. It was a question for the jury and the conditions were such that their finding must settle it.

Judgment affirmed.

CASES

IN THE

64	104
165	31
64	104
94	4845

APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—MARCH TERM, 1896.

Emma Rimmer v. O'Brien-Green Company.

1. MECHANIC'S LIEN—*Result of Employing Irresponsible Contractors.*—To pay for an inferior house, a kind of house for which the owner never contracted, is a hardship imposed by the mechanic's lien law, as the result of employing irresponsible contractors, who do not pay for their materials.

2. INTEREST.—*Vexatious Delay of Payment.*—Where it is not shown that a party is guilty of withholding money by an unreasonable and vexatious delay of payment, there is no ground for charging such party with interest.

3. CHANCERY PRACTICE—*Review of Conclusions of Fact.*—Where a party fails to have the master state upon what evidence he founds his conclusions of fact, the court can not review such conclusions.

4. SAME—*Return of the Evidence upon Which Conclusions are Found.*—It is not for a party to say upon what evidence the master found his conclusions, and attaching to the exceptions the evidence upon which such party assumed that the master based his conclusions is not a compliance with the rule.

5. MASTER IN CHANCERY—*Entitled to Fees Before He Reports.*—A party can not require a master to return into court the evidence given before him at the instance of such party, without paying him for taking it.

6. FEES—*The Question of Overcharges Must be First Raised in the Court Below.*—The question as to whether a master demanded too much, can not be determined in this court when it has not been passed upon by the court below.

7. COSTS—*Taxation of.*—Ordinarily, the taxation of costs is the duty of the clerk only.

Rimmer v. O'Brien-Green Co.

Proceedings for Mechanic's Lien.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed in part and reversed in part. Opinion filed April 27, 1896.

FAIRSON & GREENFIELD, attorneys for appellant.

Costs are entirely a matter of statutory regulation, and they can only be assessed when allowed by the statute. Chicago and Aurora R. R. Co. v. Dunning, 18 Ill. 494; Constant v. Matteson, 22 Ill. 546, 560; Eimer v. Eimer, 47 Ill. 373; Conwell v. McCowan, 53 Ill. 363; Harvey v. Harvey, 87 Ill. 54; Cooper v. McNeil, 9 Brad. 97; Poppers v. Meager, 33 Ill. App. 22; Union County v. Axley, 53 Ill. App. 673.

The statutory regulations on this subject will be found in the following places: Hurd's Rev. Stat. 1891, Chap. 90, Sec. 9, title, "Masters in Chancery;" Hurd's Rev. Stat. 1891, Chap. 53, Sec. 20, title, "Fees and Salaries;" Hurd's Rev. Stat. 1891, Chap. 82, Sec. 27, title, "Liens;" Hurd's Rev. Stat. 1891, Chap. 33, Secs. 18 and 25, title, "Costs."

The costs can be assessed against a party only as an incident to a judgment or decree determining some right or question in favor of one party and against another. Millard v. Cooper, 6 Brad. 420; Poppers v. Meager, 33 Ill. App. 20, 23.

It was error in any event to order the payment of "master's fees" generally, without fixing the amount thereof. Olds v. Loomis, 10 Brad. 498, 505; Poppers v. Meager, 33 Ill. App. 20.

The approval of the master's report was not the passing upon or approval of the fees charged by him against the appellant. Brown v. Mortgage Co., 110 Ill. 235, 240.

The confirmation of the report operated as an overruling of the exceptions, although not specifically overruled in the decree. Portoues v. Holmes, 33 Ill. App. 312.

No objections or exceptions are necessary in order to review the findings of the master upon questions of law. Hurd v. Goodrich, 59 Ill. 456; Von Tobel v. Ostrander, 42 N. E. Rep. 152; 56 Ill. App. 381.

LEVI SPRAGUE, attorney for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is a petition by the appellee to establish a lien upon premises of the appellant, for lumber supplied by the appellee to Farr Brothers for a house built by them for, and under contract with, the appellant.

The case having been referred to a master to state an account, he reported in favor of the appellee for the sum of \$417.90, with interest from January 1, 1893.

The master's report shows that Farr Brothers did not complete the work in accordance with their contract, but in many particulars substituted inferior materials and workmanship. Although their contract was in writing, they could not have claimed interest, because they were in fault and had not obtained architect's certificates as their contract with the appellant required to entitle them to payment.

The appellee had no contract in writing, and the master did not report that the appellant had withheld any money by an unreasonable and vexatious delay of payment; so that no ground for charging her with interest is in the case. It is a hardship upon her to be compelled to pay at all for an inferior house—a kind of house for which she never contracted. But that is a hardship frequently following the employment of irresponsible contractors, who do not pay for their materials. It is a hardship imposed by statute. Sec. 45, Ch. 82, "Liens," Act of 1874.

The statute concerning interest does not impose the additional hardship of paying interest; she may have had good cause to contest the claim of appellee, and for aught that appears, did so in good faith. Devine v. Edwards, 101 Ill. 138, and note.

Upon this record we can not review the conclusions of fact, because the appellant did not take steps to have the master state upon what evidence he found the conclusions, respectively, to which objections were made and exceptions taken. We have gone into this subject at length in McMannomy v. Walker, 63 Ill. App., 259, and refer to it for reasons.

Rimmer v. O'Brien-Green Co.

Exceptions to the report were filed by the appellant December 16, 1895, and on that day, on motion of the appellee, the court entered an order "That the defendant, Emma Rimmer, pay the master's fees and file her evidence in this court by January 10, 1896, or said evidence shall be disregarded and said master's report sustained and a decree entered."

January 14, 1896, the decree was entered. On the same day, whether before or after the decree may be doubtful, but we will assume that it was before, the appellant moved the court to set aside the order of December 16, 1895, and if that were denied, to set the cause down for hearing "upon the complainant's testimony now on file, and the exceptions of the defendant to the master's report."

It is true that the appellant appended to her several exceptions the evidence upon which she assumed that the master had found his conclusions that she excepted to. But it was not for her to say what evidence the master found any conclusion upon. The other side might dispute the assumption, and thus impose upon the court the labor of searching the whole evidence, if such exceptions were considered. She could not require the master to return into court the evidence given before him at her instance, without paying him for taking it. An officer is entitled to pay for his services as he renders them. *People v. Rockwell*, 2 Scam. 3; *People v. Harlow*, 29 Ill. 43.

No motion was made calling upon the court to fix the sum that the master was entitled to. Sec. 20, Ch. 53, R. S., "Fees." No motion for an order upon him to return her evidence upon any terms. Whether he demanded too much is a question not before us, as it has never been passed upon by the Superior Court.

The decree for the appellee was for the sum of \$417.90, "with interest and costs of suit, including the sum of \$274, master's fees, to be taxed as part of said costs." Ordinarily the taxation of costs is the duty of the clerk only. *Miller v. Adams*, 4 Scam. 195; *Peoria and Bureau Valley R. R. v. Bryant*, 15 Ill. 438; Secs. 25 to 28, Ch. 33, R. S., "Costs."

But in this county the court awards compensation to masters in chancery, as provided in Sec. 20, before cited.

The decree is reversed as to the interest before the decree, and affirmed for \$417.90 with costs, as therein mentioned; the only change made being in striking out the interest accruing before the decree.

The appellant had sufficient cause to appeal, and will recover her costs in this court.

Henry N. Mann v. John J. Warde.

1. **SURETY—On an Appeal Bond from a Justice of the Peace.**—A surety on an appeal bond from a justice of the peace is not entitled to have tried over again the question of the correctness of the judgment that, after trial, had been recovered against the principal in the bond.

2. **JUDGMENTS—By Default not Set Aside Unless, etc.**—There is no requirement in law or in practice that demands the setting aside of a judgment rendered upon a default, unless it is made to appear that in some way justice will thereby be promoted.

Scire Facias, on an appeal bond. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

ROBERT C. FERGUS, attorney for appellant.

EDWARD J. WALSH, attorney for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellant was surety for one George H. Fergus upon an appeal bond given upon appeal to the Circuit Court from a judgment recovered by the appellee against Fergus before a justice of the peace.

Upon a trial in the Circuit Court the appellee recovered judgment against Fergus for \$87.49, and thereupon a *scire facias* issued against appellant to show cause why judgment for said amount should not be rendered against him.

Mann v. Warde.

To the *scire facias* appellant pleaded the general issue in assumpsit, and upon a demurrer thereto being sustained, he was given leave to plead over upon condition that his new pleas should be verified.

He thereupon filed a plea of *non est factum* without verification. Whereupon the court struck his plea from the files and gave judgment against him.

Appellant then moved to vacate the judgment upon affidavits filed in support of the motion, but his motion was denied, and from the order denying that motion this appeal is prosecuted.

The appellant is confined to the reasons stated in his said affidavits filed in support of his motion to vacate the judgment.

Those affidavits tended only to show that Fergus had a good defense to the case that was appealed, and in which the judgment was recovered against him; that *scire facias* against the surety was not a proper proceeding when the appeal was not dismissed for want of prosecution, unless when it were found by the court that the appeal was prosecuted for delay (Sec. 71, Ch. 79, Rev. Stat.); that appellant had no notice of the motion to strike his pleas from the files because they were not verified, as was provided that they should be in order to be entitled to be filed, and for judgment for want of plea.

As to the first proposition, it is only necessary to say that appellant, as surety on the appeal bond, was not entitled to have tried over again the question of the correctness of the judgment that after trial had been recovered against Fergus.

As to the second proposition we regard the point, if there were otherwise one, as having been waived by pleading to the merits, and the other subsequent steps taken in the case by the appellant. See also Strauss v. Otulsky, 62 Ill. App. 660.

As to the last proposition, it is enough to say that even though it were error to strike appellant's pleas from the files and give judgment against him, without notice to him,

the appellant has shown no meritorious defense to the action, and no injury in consequence of the judgment. There is no requirement of law or in practice that demands the setting aside of a judgment by default, unless it be made to appear that in some way justice will thereby be promoted.

The bill of exceptions shows that when the motion to vacate the judgment was heard, the court refused to peremptorily vacate the judgment, but gave appellant forty-eight hours in which to file an affidavit, showing that he had a meritorious defense, and stated that if it should be made so to appear he would vacate the judgment. This leave was not responded to by appellant by showing anything in the nature of a meritorious defense.

The judgment of the Circuit Court was correct, and it will be affirmed.

Charlotte E. Dorn and Gay Dorn, trading as C. E. Dorn & Co., v. A. S. Tyler and L. A. Hippach, trading as Tyler & Hippach.

1. **VARIANCES—Question of to be Raised in the Court Below.**—Questions of variance must be raised in the trial court in order that an opportunity may be given to obviate the objection by an amendment.

2. **PRACTICE—Where one Partner Defends Against a Promissory Note Made in the Firm Name.**—Where a partnership exists, and one partner desires to defend against a promissory note made in the firm name by another partner, on the ground that the firm name has been improperly used for the private purposes of another partner, a verified plea by the complaining partner denying the execution of the note, is requisite; and without such plea the execution of the note can not be questioned. A plea of non-joint liability will not take the place of one denying the execution of the note.

3. **SAME—Proper Verification of Pleas.**—An affidavit of verification of a plea denying the execution of a note sued on, which fails to state that the plea is true, is fatally defective; the plea must be sworn to be true in order to constitute a verification of it within the meaning of the statute.

Assumpsit, on a promissory note. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

Dorn v. Tyler.

CHARLES PICKLER, attorney for appellants.

GILBERT & GILBERT, attorneys for appellees.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellees brought suit in assumpsit against the appellants as copartners, and declared specially upon a promissory note for \$300, as made May 22, 1894, by the appellants by the name of C. E. Dorn & Company, payable to the order of appellees, ninety days after the date thereof, with six per cent interest.

The copy of the note which was attached to the declaration was signed by the name of C. E. Dorn & Co., and stated its date to be May 22, 1895.

The declaration also contained the usual common counts, including one for goods sold and delivered.

The defendants (appellants) filed their joint pleas of the general issue, and of non-joint liability verified.

When upon the trial, before a jury, the appellees offered the note in evidence, it was objected to on account of a variance between it and the note described in the special count; which objection being sustained, the appellees waived the special count, and elected to proceed on the common counts, and thereupon the note was allowed to be read in evidence under the common counts, over the objection of appellants.

The suit was begun May 20, 1895, and the declaration, which was filed May 25, 1895, alleged that the indebtedness mentioned in the common counts accrued June 1, 1895, a date subsequent both to the commencement of the suit and of the filing of the declaration, and a variance in such regard is urged.

There is nothing in the record to show but that the question of variance between the common counts and the proof is raised for the first time upon this appeal. The rule is imperative that questions of variance must be raised in the trial court, in order that opportunity may there be given

to obviate the objection by an amendment. Had the specific variance now urged here been pointed out on the trial, as it should have been if advantage of it were desired to be taken, it is plain from the context and circumstances, it would have been cured by an amendment then and there by a change from 1895 to 1894. *City of Chicago v. Seben*, 62 Ill. App. 248.

It was proved that the consideration of the note for which the one in question was given in renewal, was window glass for certain buildings that were being erected by the appellant Gay Dorn, and that he signed the note in the firm name. The note was therefore properly admitted as evidence of the liability of the makers for such goods, under the common counts.

It is not denied but that appellants were copartners. It being stated by her counsel that the partnership agreement was not in writing, the appellant, Charlotte E. Dorn, was allowed to testify that a partnership between herself and her co-appellant, Gay Dorn, her husband, existed, and was formed for the purpose of the purchase and sale of real estate, loaning of money, collecting of rents, and a general commission real estate business.

We need not discuss whether the buying of window glass was within the scope of a partnership formed and existing for such purposes, although it would seem to be not entirely foreign to some of the objects thereof.

It was, however, attempted to be shown that the appellant C. E. Dorn did not know of, authorize, or in any way ratify, the giving of the note in question.

Where a partnership exists and one partner desires to defend against a promissory note made in the firm name by another partner, on the ground that the firm name had in such regard been improperly used for the private purposes of such other partner, a verified plea by the injured partner denying the execution of the note, is requisite; and without such a plea, the execution of the note can not be questioned, and a plea of non-joint liability will not take the place of one denying the execution. *Zuel v. Brown*, 78 Ill. 234; Practice Act, Chap. 110, Sec. 34, Rev. Stat.

West Chicago Park Commissioners v. Kincade.

True, the appellants did on two different occasions, once before the jury was impaneled, and again during the examination of the appellant C. E. Dorn, offer and ask leave to file their amended plea of the general issue, of non-joint liability, and of non-execution of the note, but leave to do so was denied, and was properly denied, for lack of a proper verification of the plea.

The affidavit to the offered plea was as follows, omitting all but the body of it:

“Gay Dorn and Charlotte E. Dorn, being duly sworn, on oath say they are not jointly liable for the payment of the note sued on herein, and Charlotte E. Dorn for herself says she did not execute the same.”

The fatal defect of such an affidavit is that it omits to state that the plea is true. It was necessary that the plea itself should be sworn to be true, in order to constitute a verification of it within the meaning of the statute.

Other matters have been argued, but having examined them, we do not consider it material to add to what has been said, further than to say that we find no material error in the record, and that therefore the judgment will be affirmed.

West Chicago Park Commissioners v. James Kincade.

1. **MUNICIPAL CORPORATIONS—Use of Funds for the Payment of Unauthorized Claims.**—A municipal corporation is a trustee for the public, and its funds are not to be used for the payment of unauthorized claims which, though honest in particular instances, establish precedents which open the door to fraud.

2. **SAME—No Recovery for Unauthorized Work.**—A contractor of the West Chicago Park Commissioners cut down the curb stones in a number of places, to permit the laying of sidewalks, which cutting was not a part of his contract, but was done under orders of the engineer of the commissioners, and with the knowledge of some of them that the engineer had given the orders. *Held*, he could not recover.

3. **REHEARING—Matters Not Presented at the Hearing.**—On a petition for a rehearing, the court will not go into matters which were not presented on the original hearing.

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4. **PRACTICE—*Propositions of Law.***—In actions at law in the first instance appealable to the Appellate Court, the Supreme Court can pass only upon questions of law, and in order that it may see what was held to be the law in the trial court, instructions—if the case was tried by a jury, and propositions of law, if tried by the court—must show the law adopted or rejected. But if a question is otherwise saved by appropriate motions and exceptions, the Appellate Court, without either instructions or propositions, may inquire whether the facts warrant a recovery.

5. **APPEALS TO THE SUPREME COURT—*Certificate of Importance.***—The power to grant an appeal from the Appellate Court to the Supreme Court, or a certificate of importance, is limited to twenty days after judgment, and is not extended by the time consumed upon a petition for rehearing.

Assumpsit, for extra work. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1896. Reversed and final judgment entered in this court. Opinion filed April 27, 1896.

E. T. NOONAN and VICTOR ELTING, attorneys for appellant.

The West Chicago Park Commissioners was created a corporate authority by act of the legislature of the State of Illinois. *Private Laws of Illinois, 1869* (Vol. 1), page 342.

The West Chicago Park Commissioners is a municipal corporation. *West Chicago Park Commissioners v. City of Chicago, 152 Ill. 393.*

All persons in interest are chargeable with notice of the contents of the act creating a public corporation and of all ordinances and by-laws adopted in pursuance thereof. Dillon on Municipal Corporations, Sec. 356; Tiedemann on Municipal Corporations, Sec. 153; *Mather v. City of Ottawa, 114 Ill. 659;* *Mayor, etc., of Baltimore v. Eschbach, 18 Md. 276;* *Palmyra v. Morton, 25 Mo. 593;* *City of Buffalo v. Webster, 10 Wend. 99;* *City of Knoxville v. King, 7 Lea. 441;* *Faribault v. Wilson, 34 Minn. 254.*

All persons are chargeable with notice of the nature of the duties and the extent of the powers of agents of municipal corporations. Dillon on Municipal Corporations, Sec. 447; Beach on Public Corporations, Secs. 195, 202, 241, 242. 628; Throop on Public Officers, Sec. 551; McDonald v.

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Mayor, etc., of N. Y., 68 N. Y. 23; Tamm et al. v. Lavalle, 92 Ill. 263; Dement et al. v. Rokker et al., 126 Ill. 174.

Therefore a contract made with a public agent, or work done and materials furnished upon the order of such agent, if beyond his actual authority, impose no liability upon the municipality in the absence of ratification. Dillon on Municipal Corp. (4th Ed.), Sec. 445, 447; Tiedemann on Municipal Corp., Sec. 169; Bonesteel v. Mayor, etc., of N. Y., 22 N. Y. 162; Parcel v. Barnes, 25 Ark. 261, O'Hara v. New Orleans, 30 La. An. 152; Zuttmann v. City of San Francisco, 20 Cal. 96; Hague v. City of Philadelphia, 48 Pa. St. 527; McDonald v. Mayor, etc., of N. Y., 68 N. Y. 23; Perkins v. City of St. Louis, 4 Mo. App. 322; Mayor, etc., of Baltimore v. Eschbach, 18 Md. 276; Mayor, etc., Baltimore v. Reynolds, 20 Md. 12; Donovan v. Mayor, etc., of New York, 33 N. Y. 291.

The fact that the municipality received full benefit from the work and that the plaintiff may have himself received no compensation, is without avail to change the rule. Lea v. Munroe, 7 Cranch 370.

JAMES MAHER, attorney for appellee; A. W. BROWNE, of counsel.

When a jury is waived and the cause tried by the court, the same presumptions attach to the findings of the court as would have attached to the verdict of a jury. Claybaugh v. Hennessy, 21 App. 124; Davidson v. Sprague, 21 App. 611; Alexander v. Alexander, 52 App. 195.

When a case is submitted to the court for trial, it is essentially necessary that the party appealing from the finding, should have submitted to the trial court his propositions of law to be held by it, and if none are presented it will be presumed that all questions of law were correctly decided. Davies v. Phillips, 27 Ill. App. 387; First National Bank v. Haskell, 124 Ill. 587.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

It appears from the testimony of the appellee as a wit-

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ness, that he had a contract for work on Ashland Boulevard, to the amount of \$18,000, and that he cut down curb stones to permit laying sidewalks into the curbing, which work was not part of his contract. He did it under orders of the engineer of the appellant, and with the knowledge of some of the Park Commissioners that the engineer had given such orders.

This is not enough to charge the appellant.

• It is a municipal corporation—a trustee for the public—and its funds are not to be used for the payment of unauthorized claims, which, though honest in the particular instance, by such payment establish precedents which open the door to fraud. *Hague v. City of Philadelphia*, 48 Pa. St. 527; *McDonald v. Mayor N. Y.*, 68 N. Y. 23; *Dillon Mun. Corp.*, Sec. 445 *et seq.*

The judgment in his favor is reversed, and final judgment for the appellant entered here; the case having been tried below by the court. *Union Nat'l Bank of Chicago v. Manistee Lumber Co.*, 43 Ill. App. 525; *Morris v. Wibaux*, 47 Ill. App. 630.

GARY, P. J., ON PETITION FOR REHEARING.

This petition, after reciting the foregoing opinion, urges that the appellee's original brief, taking the position "that when a case is submitted to the court for trial, it is essentially necessary that the party appealing from the finding should have submitted to the trial court his propositions of law to be held by it," was inadvertently overlooked. It is then added: "For the reasons above stated we did not go into the merits of the case in our former arguments, and said nothing about the evidence in the case, and the manifestly unfair abstract of the record made by the appellant."

He can not now go into the matter which was not then presented. *Aetna Iron Works v. Owen*, 62 Ill. App. 603.

And on the matter stated in the first extract from the petition, the brief was wrong. *Smith v. Doud*, 29 Ill. App. 290.

In two cases (to which I can not immediately refer) in

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this court, the same views so clearly expressed by Judge Wall, have been held correct. And see Bridge Co. v. Comm. Highways, 101 Ill. 518, and Bradish v. Young, 130 Ill. 386.

In cases on the law side of the court, and in the first instance appealable to an Appellate Court, the Supreme Court can pass only upon questions of law. In order that the Supreme Court may see what was held to be the law of the case in the trial court, instructions—if the case was tried by a jury—propositions of law, if the case was tried by the court—must show the law adopted or rejected in the trial court. But if the question is otherwise saved in the trial court by appropriate motions and exceptions, this court, without either instructions or propositions, may inquire whether the facts warrant a recovery.

The judgment here was entered April 18, 1896. We are now, May 14, 1896, asked to grant a certificate of importance, and an appeal to the Supreme Court.

Our power to grant either, is limited to twenty days after judgment, and is not extended by the time consumed upon a petition for a rehearing. McLachlan v. McLachlan, 126 Ill. 427; Sholty v. McIntyre, 136 Ill. 33.

The petition is denied.

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National Linseed Oil Company v. Daniel McBlaine.

1. **REASONABLE CARE—Exercise of, a Question for the Jury.**—The question as to whether a person is in the exercise of reasonable care, at the time of receiving an injury, is one of fact for the determination of a jury; and its conclusions in a case of conflicting evidence must be treated as final.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

GURLEY & WOOD, attorneys for appellant.

C. M. HARDY, attorney for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee was in the service of the appellant, which operated a mill for the manufacture, as its name indicates, of linseed oil.

Among the duties imposed upon appellee by such service, was that of oiling certain machinery, and the suit was brought and judgment recovered for injuries sustained while so engaged.

The declaration alleged that appellant failed to furnish a reasonably safe oil can for appellee's work; that appellee objected; that appellant promised to furnish him, within a reasonable time, with a suitable can, reasonably safe; that appellee relied on this promise, and proceeded with his employment, and by reason of the defective can he was using, received his injuries. The failure to furnish a reasonably safe oil can under such circumstances constituted the claim of appellee, upon which the recovery was had.

We think the jury were clearly justified in finding that the can with which appellee was at work when the accident happened was not of a reasonably safe kind to do the work. It was described as "a can fifteen inches around the bottom, and ran up tapering to the spout, about nine inches long altogether, including the spout, with a spring in the bottom that you had to press on to force the oil from it, and was otherwise mentioned as a squirt can."

As we understand it to have been, it was in form like the small cans common in domestic use for oiling sewing machines, and operated by a pressure of the thumb of the hand in which it is held upon the bottom, which yields to pressure and springs back when the pressure is relaxed.

The appellee testified that he had worked for the appellant two or three years, performing what would perhaps come under the heading of a general laborer's duty, when he was directed to make it his business every day to oil certain of the shafting and gearing, and was furnished with

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the kind of oil can already described to do the work with. Thinking that the can was not fit for that work, he borrowed from some other employe in the mill a can with a long spout and a handle, and did the oiling which he had been directed to do. Before the time came for repeating the duty he told the superintendent that he was not provided with the proper kind of can, and asked for one with a handle and long spout from which the oil could be poured, like the one he had borrowed, and was promised by the superintendent that such an one should be got for him. Under repeated requests for another can, accompanied always by promises of one, the appellee continued to perform the work with the can that he had been enabled to borrow. There came a day, however, when that can could not be had, and upon a repetition of complaint and request to the superintendent, the appellee was told to do the best he could with the squirt can for that occasion, and until a new can could be got. In so doing, and while reaching over a revolving shaft to oil the gearing to one of a pair of mitre wheels, the spout of the can caught in the gearing and his hand was jerked between the cogs and the injury done.

The essential facts so testified to by the appellee, were not contradicted, but the conclusion of the jury upon the conflicting evidence must be treated as final.

The shaft and gearing which the appellee was engaged in oiling at the time of the injury, were suspended by hangars from the ceiling of the room, which was about thirteen feet high, and could only be reached by a step-ladder, or other means that would raise a person above the floor. On the occasion in question, the floor under the machinery was covered with oil cake piled about five feet high, which prevented the use of a step-ladder, and upon such pile of oil cake the appellee climbed and was standing when doing his work. This condition of oil cake being piled upon the floor seems to have not been uncommon, and does not seem to have of itself increased the hazard of the work, it being dry and hard, and reasonably safe to walk about upon.

Counsel for appellant says in his brief: "The defense

was, among other grounds, that, as a matter of fact, appellee was using a long-spouted can at the time he was injured. That even if he had been using a squirt can, this was a suitable and reasonably safe can with which to do the work. That appellee was not exercising due and reasonable care for his own safety, in that he might have stood upon the west side of the main shaft, upon the cake pile, and performed the work in perfect safety; instead of which he negligently and carelessly stood on the east side, and reached over the gear wheels in oiling the point G. That had he chosen to stand on the west side he might have used, with perfect safety, a cup, or the palm of his hand, or any other kind of receptacle for oil; and the squirt can was a perfectly safe appliance for that work."

Except as to the point that the appellee might have stood upon the cake pile on the west side of the main shaft, and there performed the act of oiling the particular gearing at which he was engaged, with more regard to his own safety than by standing where he did when hurt, there would be nothing in the position of the appellant of which we would be inclined to say more than that the verdict of the jury was a final settlement thereof.

The evidence showed that the main shaft of the factory extended from north to south through the room, and passed through and operated a mitre wheel, the cogs of which fitted into those of another like wheel which was supported at the end of another shaft that ran east and west, and came to within the distance of half the diameter of the first wheel, or about fifteen inches, from the main shaft. This second shaft, which ran from east to west, was operated from the main shaft, through or by means of the two mitre wheels meshing or working into one another.

The appellee stood, when hurt, upon a pile of oil cake on the east side of the main shaft and reached westwardly over the main shaft and across the second wheel, a distance of at least fifteen inches, in endeavoring to oil the box beyond in which the shaft that supported the wheel turned.

It is plain, that everything else being equal, it would have

been safer for the appellee to have stationed himself on the west side of the main shaft when attempting to pour oil into the box indicated. But it is made to appear that at a distance of a few feet west from the main shaft there was operated from the second shaft a belt that ran north and south and slantwise from the shaft through the floor, and into the cake-mill room below where it operated machinery for grinding the oil cake. The cake pile extended about three feet west of the main shaft, and to within four to six feet of that belt; and it was testified that with a person stepping about on top of the end of the pile, as he would be when at the gearing or box, which appellee was engaged in oiling, there was danger of the pile sliding away and throwing the person who might be upon it into the belt, and that it was safer, as well as more convenient, under such circumstances, to do the oiling from the point where appellee stood than to go to the west side of the main shaft, where the one so engaged would be near the end of the pile. It is manifest that with the cake so piled upon the floor, a step-ladder could not be used, and we think that, all the evidence considered, the conclusion of the jury that appellee was in the exercise of due and reasonable care for his own safety in performing the work from where he stood at the time, should not be disturbed.

The verdict of \$5,000 that the jury gave, was unquestionably excessive, and the learned trial judge, in a most commendable exercise of his power, required it to be remitted down to the sum of \$2,500, as a condition to not allowing a new trial on that ground. From a careful consideration of the evidence concerning the extent of appellee's injuries, we regard the judgment for that sum as large, but having great confidence in the calm judgment of the trial court who saw the appellee's injured hand, and heard the testimony as to the extent of his incapacity and suffering, we refrain from a reversal of the judgment on that ground alone, there seeming to be nothing else in the record upon which a reversal can be predicated.

Complaint is made of the admission of what is called im-

proper evidence on the part of the appellee; and also, of the refusal by the trial court to give the last eight of the twenty-three instructions offered by the appellant, the first fifteen of which offered instructions were given.

The questions of law raised by the errors assigned upon which such complaints are based, do not, in our opinion, demand either time or space to discuss.

The judgment of the Circuit Court is affirmed.

Heinrich Mundhenke v. William Mundhenke.

1. **NON-SUIT—*When it May be Taken.***—Where the trial is by the court without a jury the plaintiff may take a non-suit after the court has stated its finding but before a minute of record has been made. The court can not deprive a plaintiff of this right by first making the minute and then announcing its opinion.

Assumpsit, upon a promissory note. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded with directions Opinion filed April 27, 1896.

M. D. BROWN, attorney for appellant.

CUTTING, CASTLE & WILLIAMS, attorneys for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This cause was tried before a judge of the Circuit Court without a jury, and resulted in a finding of the issues in favor of the defendant (appellee here), and a judgment against the plaintiff (appellant), for costs.

The bill of exceptions, at the conclusion of the evidence, states as follows :

“ Whereupon the court entered of record a finding for the defendant, in the words and figures following, to wit : ‘The court finds the issues for the defendant, and judgment

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on the finding, and against the plaintiff, for costs of this suit.'

THE COURT: I will have to find for the defendant.

MR. BROWN: I will take a non-suit. This motion for non-suit was made and asked for immediately on the court announcing his finding, and before any entry on the record of the court's finding was announced or made known.

To which counsel for defendant then and there objected, on the ground that it was too late after the court had announced his finding. The objection was sustained, to which ruling counsel for plaintiff then and there excepted."

Then follows:

"The foregoing was all the evidence introduced on the trial of this cause, and thereupon the court announced his finding to be against the plaintiff. Whereupon the plaintiff, by his counsel, immediately moved for a non-suit. The court overruled the motion, and to which ruling the plaintiff then and there, by his counsel, excepted. Said motion for a non-suit was made before any entry on the record of the court's finding was announced by the court.

Whereupon the plaintiff, by his counsel, excepted to the finding of the court and moved for a new trial, which motion for a new trial is in words and figures as follows:"

It is not quite clear what the precise meaning is of what is so quoted, but assuming it to mean what appellee says in his brief, that "the finding of the court for the defendant was entered of record before the court announced it, and before counsel for plaintiff moved for a non-suit," it was error for the court to deny to appellant his right to take a non-suit.

In Howe v. Harroun, 17 Ill. 494, the court commented upon the course of practice to be pursued with reference to taking non-suits, in cases where the issues of fact have been submitted to the court for trial in place of a jury, and held that the plaintiff, in such cases, must have the right to take a non-suit, after the court has announced its opinion, and before a note thereof is entered.

And this court, in Turnock v. Walker, 54 Ill. App. 374,

where numerous other authorities are cited, said: "When a case is tried without a jury, a party is entitled to take a non-suit when the same is moved for before a note has been made of the finding of the court." See, also, Denton v. Central S. S. House, 61 Ill. App. 267.

The precise point was not involved in either of those cases that here arises under the assumption of fact, as stated; but manifest reason and justice require that if the right to take a non-suit exists after the court has announced its opinion, but before a minute of record has been made, the court should not be permitted to deprive a plaintiff of that right by first making the minute and then announcing its opinion.

The appellant made his motion for a non-suit in apt time, and it should have been allowed.

The judgment will therefore be reversed and the cause remanded, with directions to enter a non-suit upon appellant's said motion. Reversed with directions.

Thomas S. Corrigan v. J. J. Reilly et al.

1. **LIMITATIONS—*The Statute Must be Pleading.***—The rule is uniform that the defense of the statute of limitations must be pleaded by one who relies thereon.

2. **PRACTICE—*Where the Statute of Limitations is Pleading.***—A plaintiff in an action upon a promissory note is not bound to set out in his declaration the facts which take his action out of the bar of the statute. The proper practice in such cases is to declare upon the original obligation, and if the statute is interposed as a defense, to set up facts in avoidance by replication.

3. **COURTS—*Power at Subsequent Terms.***—When a judgment is rendered at the June term, and no time given within which to present a bill of exceptions, the court can not at the October term, from its recollection, by signing a bill of exceptions, add to or take from the record made at the June term.

4. **PROMISSORY NOTES—*Made Prior to the Revision of 1872 Limitations.***—To a note made May 22, 1867, payable six months after date, a proper plea of the statute of limitations is that in force prior to the revision of 1872, being that the cause of action did not accrue within sixteen years.

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Assumpsit, on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

PRENTISS, HALL & GREGG and A. M. LASLEY, attorneys for appellant.

STEELE & ROBERTS, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of court overruling appellant's motion, made July 8, 1895, the June term, to set aside and vacate a judgment rendered that day. The order appealed from was made September 30, 1895, the September term.

The declaration contains a count upon a promissory note, described as made May 23, 1867, payable six months after date; and also includes several of the common counts.

The defendant pleaded the general issue and that the cause of action did not accrue within ten years.

The plaintiff replied, alleging a payment of \$20 March 11, 1895, and a written promise at that time by the defendant to pay the sum still remaining due.

The defendant rejoined that the action did not accrue within ten years, etc., and denied the payment of the \$20 set forth in plaintiff's replication, and denied the promise to pay.

Issue was joined, and the trial had. A verdict and judgment was rendered for the plaintiff.

Appellant contends that there was no necessity for pleading the statute of limitations; that the declaration upon the note showing that it became due in 1867, and that suit was brought thereon in 1894, disclosed no cause of action.

The rule is uniform that the defense of the statute of limitations must be pleaded by one who relies thereon. Borders v. Murphy, 78 Ill. 81; Emory v. Keighan, 88 Ill. 492; Burnap v. Wight, 14 Ill. 303; Gebhart v. Adams, 23

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Ill. 397; C. & A. R. R. v. Glenney, 28 App. 364; Cornwell v. Broom, Adm'x, 34 App. 392.

Appellee was not bound, in his declaration, to set out the facts which took the action on the note out of the bar of the statute. The proper practice in such cases is to declare upon the original obligation, and if the statute is interposed as a defense, to set up such facts by replication. 1 Chitty's Pleading, 583; Keener v. Crull, 19 Ill. 189; Varner v. Same, 69 Ill. 445; Adams Express Co. v. King, 3 Brad. 316; Brockman v. Sieverling, 6 Brad. 512.

Judgment in this case having been rendered at the June term, 1895, and no time having then been given within which to present a bill of exceptions, the court could not at the October term, 1895, from its recollection, add to or take from the record made three terms previous. There is nothing showing that the court had before it any written memoranda from which it, at the October term could, by signing a bill of exceptions, add to the record of this cause. There is therefore in the record nothing to show upon what evidence the judgment was rendered. The common counts are sufficient to sustain the judgment.

The proper plea of the statute of limitations would have been that in force prior to the revision of 1872; being that the cause of action did not accrue within sixteen years.

The refusal of the Circuit Court to set aside the judgment is affirmed.

Louis A. Hippach v. Sanford Makeever.

1. EXCEPTIONS—*Not Necessary to the Action of the Court on Demurrer.*—The action of the court upon a demurrer is reviewable without an exception having been taken.

2. PRACTICE—*Waiver of Error in Sustaining a Demurrer.*—Where a defendant files special pleas to which a demurrer is sustained, and afterward stipulates that, under his plea of the general issue, he may prove any defense that might be proved under special pleas properly pleaded, he waives all error in sustaining the demurrer.

3. CONSIDERATION—*In Contracts of Guaranty.*—The want of a consid-

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eration for a contract of guaranty indorsed upon a promissory note is not the subject of a special plea, and a demurrer to such a plea, on the ground that it amounts to the general issue, is properly sustained.

4. *PLEADING—Matters in Abatement not to be Pleaded in Bar.*—The fact that before the commencement of a suit upon a promissory note the defendant, a guarantor, was summoned as garnishee in an attachment suit against the maker and payee, and which was still pending, is pleadable in abatement and not in bar.

5. *ACTIONS—Defendant Served as Garnishee in Another Proceeding.*—Where a defendant in an action at law has been summoned as garnishee in a proceeding by attachment for the same cause, such attachment and service as garnishee is probably only cause for postponing the action until the attachment is disposed of.

Assumpsit, on contract of guaranty. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

EDWARD J. WALSH, attorney for appellant.

Wm. E. O'NEILL, attorney for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a suit brought by appellee against the appellant upon a contract of guaranty executed by the latter upon the back of a promissory note, dated April 7, 1894, made by one Charles F. Hippach to the order of Frederick R. Benson, for \$1,000, payable March 1, 1895.

The said contract of guaranty was as follows:

“For value received, I hereby guarantee the payment of the within note on or before six months after the maturity thereof.

Louis A. Hippach.”

The declaration consisted of the common counts in assumpsit, and a special count against appellant as guarantor. The special count, among other things, alleged that on the same day of the making of said note, and in consideration that the payee thereof, at the request of appellant, would accept the same, the appellant guaranteed the payment thereof, etc.

The appellant pleaded the general issue and two special pleas.

To the special pleas the appellee demurred, assigning special causes of demurrer to each, and the demurrer was sustained.

The order sustaining the demurrer, as subsequently amended, was as follows:

"This cause coming on to be heard upon the special demurrer of the plaintiff to the defendant's second and third pleas, and the general demurrer to the defendant's fourth plea filed, after arguments of counsel and due deliberation by the court, said demurrers are sustained, and thereupon on the agreement of the parties now here made in open court, it is ordered that the defendant be allowed to prove under the plea of the general issue filed herein, anything that could be proven by special pleas properly pleaded, whereupon the defendant excepts."

Then, again, some three weeks later, appellant was given leave to withdraw his plea of the general issue, and he thereupon elected to stand by his said special pleas, whereupon, for want of a plea, judgment for \$1,046.05 and costs was rendered against him, from which this appeal is prosecuted.

We need not consider the sufficiency of the special pleas, for the simple reason that by the same order which sustained the demurrer to the pleas, leave was given to the appellant, upon agreement made by him and his adversary in open court, to prove every defense that he could have proved if specially pleaded.

In his reply brief the appellant points out the recital in the order that he excepted to something, without specifying what, and he claims exemption from the effect of his agreement therein set forth, because of such exception.

An exception to the ruling of a court has no place in the record made by the clerk of its orders, but if the exception were properly there, we should be obliged to treat it as an exception to the action of the court in sustaining the demurrer and not as an exception to appellant's own action in making the agreement.

The action of the court in sustaining the demurrer did not need to be excepted to, but would be reviewable with-

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out an exception having been taken, and assuming for present purposes, that, but for the agreement, such action was erroneous, still, with the agreement, it is plain that there was no prejudicial error; for, notwithstanding the demurrer was sustained, the right of the appellant to make every defense under his plea of the general issue, which he could have made under any good plea, was expressly preserved to him. If he had wanted to have a review, upon appeal, of the question of the sufficiency of his pleas, he should have stood by his pleas at the time the demurrer thereto was sustained, and not have entered into the agreement which he made. By doing what he did, the error, if any, was waived. *Snell v. Cottingham*, 72 Ill. 161; *Lullman v. Barrett*, 18 Ill. App. 573.

The judgment of the Superior Court will be affirmed.

GARY, P. J. I concur, but add as a further opinion of the court, that the pleas were mere waste paper.

The first special plea was that the appellee held the note for the benefit of the payee, and that the appellant indorsed it without consideration.

The legal title to the note being in the appellee was enough. *Foster v. Second Nat'l Bank*, 61 Ill. App. 272; *Whitford v. Herting*, 60 Ill. App. 413.

And the want of consideration for the guaranty is not the subject of a special plea, if it be specially demurred to—as this was—on the ground that it amounts to the general issue. *Klein v. Currier*, 14 Ill. 237.

The other special plea is that the appellee held the note for the benefit of the payee, and that before this suit was commenced, the appellant was summoned as garnishee in an attachment suit—which was still pending—against the payee and maker. At the most, this was only pleadable in abatement, not in bar. The effect of holding it to be a bar, if proved, would be that if the attachment suit failed, the appellee could never sue again. *Guard v. Whiteside*, 13 Ill. 7.

But the modern rule probably is that such attachment is

only cause for postponing the cause in which such defense is interposed, until the attachment is disposed of. 1 Ency. Pl. & Pr. 765; Roche v. Rhode Island Ins., 2 Ill. App. 360; Brickey v. Davis, 9 Ill. App. 362.

Nowhere was such matter ever held to be a bar. Affirmed.

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Philo N. Baxter v. Louisville New Albany & Chicago Ry. Co.

1. **COMMON CARRIERS—Condition Limiting the Right of Recovery.**—A carrier of live stock may lawfully insert in its receipt given to shippers, as a condition precedent to the right of recovery of damages for loss or injury to such stock, that notice shall be given to some of its officers, or to its nearest station agent, of such injury or loss before the stock is removed from the place of delivery or destination, or mingled with other stock.

Trespass on the Case, injury to live stock by common carrier. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1896, Affirmed. Opinion filed April 27, 1896.

BULKLEY, GRAY & MORE, attorneys for appellant.

The rule is that a carrier in the exercise of the right of routing, must use such care as an ordinarily prudent person would under the same circumstances, and must select the most usual, safe, direct and expeditious route. Failing in this he will be held liable for loss. Wells, Fargo & Co. v. Fuller, 23 S. W. Rep. 412; Merchants Dispatch Trans. Co. v. Kahn, 76 Ill. 520.

Shippers and owners of goods have a right to control the route of shipment, and if not followed and damages result, the carrier is liable. M. S. N. & Ind. Ry. Co. v. Day, 20 Ill. 375.

In construing contracts limiting the liability of common carriers, the provisions of the contract are not to be construed literally in favor of the carrier. Cream City Ry. Co. v. C. M. & St. P. Ry. Co., 23 N. W. Rep. 425.

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In trespass for negligence in carrying mules it is proper to permit witnesses who for years had shipped mules and knew their habits, and saw those in suit when unloaded, to give their opinion as to the cause of the injury the mules sustained while in the car. Schaeffer v. Phila., etc., Ry. Co., 31 Atl. 1088.

Without an agreement to that effect, a railroad company is not bound to carry goods beyond its own lines, but if it does so agree, its common law liability extends to the place of destination. Wabash Ry. Co. v. Harris, 55 Ill. App. 159.

It is a question for the jury to determine whether the terms of a receipt or bill of lading limiting the liability to the carrier's own line was fairly made, understood, and assented to by the consignor. Ill. Cen. Ry. Co. v. Frankenberg, 54 Ill. 88; Fields v. C. & R. I. Ry. Co., 71 Ill. 458.

It does not necessarily follow because the shipper accepted a receipt for the goods to be carried, containing limitations of the carrier's liability, that he assents thereto. Anchor Line v. Dater, 68 Ill. 369.

A common law carrier can not, even by express contract, exempt itself from liability resulting from gross negligence or from willful misconduct committed by itself, its servants or emloyees, nor can it limit its liability in amount as against damage resulting from such negligence. C. & N. W. Ry. Co. v. Chapman, 133 Ill. 96; Abrams v. Milwaukee etc., Ry. Co., 9 Am. Ry. & Corp. Rep. 354.

A contract by a common carrier limiting its liability for damages occasioned by its negligence is governed by the *lex loci contractus*. Fairchild v. Phila. W. B. R. R. Co., 14 Pa. St. 537; 24 Atl. Rep. 79; Patten v. Majestic, 9 C. C. A. 161; 50 Fed. Rep. 624; Wuffman v. Carib Prince, 63 Fed. Rep. 265.

GEO. W. KRETZINGER, attorney for appellee, contended that a common carrier may lawfully limit and restrict its common law liability.

In Railway Company v. Morrison, 19 Ill. 135, Mr. Justice Breese said that common carriers had a right to restrict

their liability as common carriers by such contracts as may be agreed upon specially.

The same question was involved and the right upheld in *Black v. Railway Co.*, 111 Ill. 351; *Railway Co. v. Chapman*, 133 Ill. 96; *Black v. Railway Co.*, 11 Brad. 465; see also *Railway Co. v. Bennett*, 6 A. & E. R. R. Cases 391; *Snow v. Railway Co.*, 18 Am. & Eng. R. R. Cases, 161; 51 N. Y. 562; *Hewitt v. Railway Company*, 18 A. & E. R. R. Cases, 568; *Milligan v. Railroad Co.*, 36 Iowa 181; *Railway Company v. Cleary*, 16 A. & E. Ry. Cases, 122; 77 Mo. 634; *Hall Executor v. Pa. Company*, 16 A. & E. Ry. Cases, 165; 90 Ind. 459; *Black v. Railway Company*, 111 Ill. 351; *Lewis v. Great Western Railway Co.*, 5 Hurlstone & Norman, 867; *Rice v. K. P. Ry. Co.*, 63 Mo. 314; *Wolff v. Western Union Tel. Co.*, 62 Pa. 83; *Yorn v. Central Ry. Co.*, 3 Wall. 107; *Express Co. v. Caldwell*, 21 Wall. 264; *Goggin v. Railway*, 12 Kans. 416; *Bankford v. Railway Co.*, 34 Md. 197; *Arnold v. Railway*, 83 Ill. 273; *Oxley v. St. Louis Ry. Co.*, 65 Mo. 629; *Dawson v. St. Louis Ry. Co.*, 76 Mo. 514; *Texas Ry. Co. v. Morris*, 16 Am. & Eng. R. Ry. Cases, 259; *Packard v. Van Schoick*, 58 Ill., p. 82; *Goggin v. Railway Company*, 12 Kan. 418; *Worsley v. Wood*, 6 Term R. 710; *Morgan v. Birnie*, 9 Bing. 672; *Smith v. Briggs*, 3 Denio 73; *United States v. Robeson*, 9 Peters 319; *Railway Co. v. Morris*, 16 A. & E. R. R. Cases, 259.

The doctrine is settled in this court, that railroad companies, may by contract, exempt themselves from liability on account of the negligence of their servants, other than that which is gross or willful. *Railway Co. v. Morrison*, 19 Ill. 136; *Railway Co. v. Read*, 37 Ill. 484; *Railroad Co. v. Adams*, 42 Ill. 474; *Adams Express Co. v. Haynes*, 42 Ill. 89; *Erie Company v. Wilcox*, 84 Ill. 239; *Merchants Dispatch Co. v. Bolles*, 80 Ill. 473; *Arnold v. Ry. Co.*, 83 Ill. 273.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant sues the appellee for damages alleged to

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three cars of live stock shipped by him over the road of the appellee from Chicago, consigned to Richmond, Va.

His declaration alleges that the contract for carriage was contained in "three separate receipts in writing" executed by both parties, of the contents of which a portion is in effect set out in the declaration. Portions of each not so set out are as follows:

"And it is further distinctly understood by the parties hereto, that all liability of said Louisville, New Albany and Chicago Railway Company as carriers shall cease at Louisville, Ky., when ready to be delivered to the owner, consignee or carrier whose line may constitute a part of the route to destination.

"And for the considerations before mentioned, the said party of the second part further agrees that as a condition precedent to his right to recover any damages for loss and injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same, to said party of the second part, and before such stock is mingled with other stock."

The damages claimed are mostly for what happened after leaving Louisville over other roads, but as the court directed the jury to find for the appellee, solely because no notice was given pursuant to the last above extract—in doing which we think the court did not err—we will only consider that feature of the case.

The condition requiring notice is as easy to be complied with as any that could be framed and be of any avail.

"Notice in writing of his claim thereof," not necessary that appellant should personally sign the notice—his agent could do it; not necessary to give any detail of the injury claimed, merely that he claimed injury; and directed generally to the appellee by its corporate name, and mailed for Louisville, New Albany or Chicago, it is hardly possible that it would not have come to an officer—so nearly impossible that it would be a question for a jury, with no doubt of the answer.

In *Black v. Wabash, St. Louis & Pacific R. R.*, 111 Ill. 351, the court, in considering a much more onerous condition, has refuted every argument of the appellant here.

There the claim was to be verified by affidavit, which might not unreasonably be held to imply that particulars must be stated, and it was to be "delivered to the general freight agent," "at his office in the city of St. Louis, within five days from the time" the stock was removed from the cars. Here it was only necessary that the time of notice should be such as to enable the appellee to investigate the claim at the place of destination, and while the stock continued segregated from other stock. The place of destination means, not the yards of the appellee, where the stock could not remain, but some convenient place at Richmond, where they would not be mingled with other stock.

We need not look for other authority.

The opinion of the Supreme Court—to be our guide—needs not to be fortified. We have acted upon the same principle in *Western Union Tel. Co. v. Beck*, 58 Ill. App. 564. No question of fact as to what the contract was arises in this case, as in the case before the Supreme Court; the appellant here declares upon it.

The judgment is affirmed.

William C. Reynolds et al. v. Charles H. Fuller, Assignee of the National Manufacturing & Importing Company.

1. **VOLUNTARY ASSIGNMENTS—*Power of the Assignee as to Leasehold Interests.***—An assignee of an insolvent estate has a reasonable time within which to determine whether he will keep such a leasehold interest as his assignor had, subject to the payment of the stipulated rent, or will abandon the premises. If he elects to retain such leasehold and consequently to pay the rent accruing thereon, the election is, if not confirmed by the court, merely personal, binding him as assignee, and does not create a claim by the landlord against the estate.

2. **SAME—*Claim for Rent as Expense.***—Where the assignee occupies

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rooms without an order of court the claim for the rent thereof, like claims for services performed for the assignee, is a claim against him personally, and whether it is such an expense as the court will allow to the assignee is for its decision.

3. *SAME—Rent of Rooms as an Expense of the Estate.*—Where the rent of rooms used by an assignee for the benefit of the estate is spoken of as an expense of the estate, what is meant, if such use has not been approved by the court, is, that it is a matter for which a proper allowance should be made by the court, not that the assignee can in such case, without authority from the court, conclude and bind the estate.

4. *SAME—Effect upon Leases held by the Assignor.*—Leases held by an insolvent assignor are not terminated by an assignment for the benefit of his creditors; the landlord is entitled to prove, with other creditors, his claims for rent already due, and for that which shall accrue, but he is not a preferred creditor.

5. *SAME—Rights of a Lessor.*—The right of the landlord to terminate the lease for the non-payment of rent is not destroyed by the assignment. He is entitled to insist upon all his legal and equitable rights notwithstanding.

Voluntary Assignment.—Claim for rent. Appeal from the County Court of Cook County; the Hon. C. H. DONNELLY, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded, with directions. Opinion filed April 27, 1896.

STATEMENT OF THE CASE.

On April 18, 1895, the insolvent National Manufacturing & Importing Co., then occupying rooms 320, 330, 340 and 350, in the Caxton building, owned by appellants, made a voluntary assignment to Charles S. Sheppard, who was succeeded two days later by the appellee. At that time there were in existence two separate leases of the premises, expiring respectively on April 30, 1895, and April 30, 1896. These leases alike provided for rent at the rate of \$110 per month, and were alike in general details and provisions. When the present assignee took the premises he had no knowledge of these leases. During May, 1895, he gave up room 350, retaining the others, which he continued to use until February, 1896. The assignee during May, 1895, without leave of court and before appellant's claim was filed, orally agreed to pay \$85 per month for the three rooms occupied by him so long as he should remain there,

but at this time the assignee had no knowledge of the second lease. Payments were made in substantial accordance with this arrangement until July 17, 1895. On July 20, 1895, appellants filed their claim against the estate, asking "that a claim may be allowed to them for the sum of said \$1,540" (the total amount of rents due and to become due under both leases), "besides \$100 for attorney's fees, making a total of \$1,640, with such allowance in reference to interest as may be in accordance with the rights of the parties." No objection to this claim was filed, and upon the expiration of the statutory period, by virtue of the statute, it became fixed and allowed as a liquidated claim against the estate for the full amount.

Thereupon the assignee ceased to make payments on account of the use and occupation of the premises, taking the position that appellants had exhausted their rights by the allowance of a claim for the entire rental value of the premises, and that appellee was entitled to occupy the premises during the remainder of the term with no other compensation than the payment of dividends upon the claim. A petition was filed by appellants seeking payment for the use and occupation of the premises in addition to dividends upon their claim, to which the assignee made answer on the foregoing theory, and alleging further that the payments made by the assignee to appellants prior to July 20, 1895, should be credited on dividends allowed to appellants. Upon the foregoing pleadings and a replication filed by appellants, a hearing was had and an order entered adopting the view of the assignee so far as concerned the relief sought by appellants, for which order this appeal is taken.

WILLARD & MOORE, attorneys for appellants, contended that the rent for use and occupation by the assignee is an expense of administration which must be paid in full.

A receiver or assignee takes *cum onere* and the rent or use and occupation of the premises while occupied by him is an expense of administration, a preferred claim against the estate of the insolvent. *Baker v. Singer*, 35 Ill. App.

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271; **White & More**, 54, Ill. App. 606; **Spencer v. World's Columbian Exposition**, 58 Ill. App. 637; **Smith v. Goodman**, 43 Ill. App. 530; **Smith v. Goodman**, 149 Ill. 75; **Williard v. World's Fair Encampment Co.**, 59 Ill. App. 336.

The amount claimed from the insolvent estate for use and occupation by the assignee being less than the amount of rent fixed by the leases, the landlords are also entitled to a dividend as general creditors. The tenant is not discharged by insolvency or by the abandonment of the premises by the assignee. It remains wholly bound by all of the covenants of the lease. **Hartford Deposit Co. v. Chemical Nat'l Bank**, 58 Ill. App. 256; 156 Ill. 522; **Chicago Fire Place Co. v. Tait**, 58 Ill. App. 293; **Grommes v. St. Paul Trust Co.**, 147 Ill. 634; 47 Ill. App. 568; **Smith v. Goodman**, 149 Ill. 75.

He is not estopped from claiming all the cumulative rights which the law could give us. Our rights are to be considered from the standpoint of equity. **Grommes v. St. Paul Trust Co.**, 147 Ill. 634; **2 Taylor, Landlord and Tenant** (8th Ed.), 226; **Brown v. Starin**, 56 Ill. App. 231; **City of Roodhouse v. Christian**, 158 Ill. 137; **Barchard v. Kohn**, 157 Ill. 579; reversing same case, 54 Ill. App. 629; **Atkins v. Byrnes**, 71 Ill. 326; **Holden v. Holden**, 24 Ill. App. 106; **Union Trust Co. v. Trumbull**, 137 Ill. 146; **Shepard v. Speer**, 41 Ill. App. 211; **Atlas Nat. Bank v. More**, 152 Ill. 528.

SMITH, SHEDD, UNDERWOOD & HALL, attorneys for appellee, contended that a landlord does not occupy the position of creditor holding collateral. Colebrooke on Collateral Securities, Sec. 2; Bouvier's Law Dictionary; 3 Am. & Eng. Ency. 311; **Munn v. McDonald**, 10 Watts (Pa.) 270.

Dividends are to be allowed to holders of collateral upon the amount due at the time of filing claim. **Levy v. Chicago National Bank**, 158 Ill. 88.

Upon the allowance of appellant's claim against the insolvent for the full amount of rent to become due, the assignee became entitled to the premises as the property of the insolvent. **Dendy v. Nichol**, 4 C. B. (N. S.) 376.

A party having two inconsistent remedies must elect between them, and is bound by his election when made. Herman on *Estoppel*, Secs. 1040-1048; *Rockford v. Travel-stood*, 29 Ill. App. 659; *Bigelow on Estoppel*, 578.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

An assignee of an insolvent estate has a reasonable time within which to determine whether he will keep such leasehold interest as his assignor had, subject to the payment of the stipulated rent, or will abandon the premises. If he elect to retain such leasehold and consequently to pay the rent accruing thereon, the election is, if not confirmed by the court, merely personal, binding him as assignee, and does not create a claim by the landlord against the estate. Whether the court will allow such rent to be paid out of the estate, or reimburse the assignee for payment thereof by him made, is a question for the future determination of the court.

So, too, as to rooms occupied by the assignee without an order of the court, the claim for rent thereof, like claims for service performed for the assignee, is against the assignee; and while often spoken of as an expense of administration, it is yet a claim against the assignee personally, and whether it is such an expense as the court will allow to the assignee, is for its decision. *Sperry, guardian, v. Fanning et al.*, 80 Ill. 371-374; *High on Receivers*, Sec. 180-186; *Perry on Trusts*, Sec. 437a; *Gill v. Carmine*, 55 Md. 339; *People v. Abbott*, 107 N. Y. 225; *Hackman v. McGuire*, 20 Mo. App. 286; *Smith v. Goodman*, 43 Ill. App. 530.

When the rent of rooms used by an assignee for the benefit of the estate is spoken of as an expense of the estate, what is meant, if such use has not been approved by the court, is, that it is a matter for which a proper allowance should be made by the court; not that the assignee can in such case, without authority from the court, conclude and bind the estate.

The assignment was for the benefit of claims then existing; these are to be paid *pro rata*. Appellants then had an

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unearned claim, which in the ordinary course of events would be earned and become due. Such claim, as earned and due, they have been allowed. They now ask that the amount allowed them shall be paid to them as an expense of the estate.

If the assignee has occupied the premises, they are entitled to be paid by him, and if he has contracted to pay rent for the premises until the end of the time for which they were leased to the assignor, then the assignee should perform his contract.

Whether the assignee should be allowed by the court the amount he has so paid, or become liable to pay, is for the court to determine.

Undoubtedly the court might, for such amount as it thought proper, direct the assignee to pay the landlord instead of waiting for the assignee to first pay and then have his payment approved and credited to his account.

In the present case, the County Court has seen fit to refuse to order the assignee to pay his landlord, appellant, what is due from the assignee for the use and occupation by him of certain premises, such use and occupation not having been directed or approved by the court. That is, the County Court has refused to make what would seem to have been a good claim against the assignee, a claim against the estate.

By an assignment, the leases held by the assignor are not terminated; the landlord is entitled to prove, with other creditors, his claim for rent already due, and for that which shall accrue. *Smith v. Goodman*, 149 Ill. 75, but he is not a preferred creditor.

Ordinarily a landlord has a kind of security, in that he may terminate the lease for non-payment of rent; this right is not destroyed by an assignment.

After assignment by his tenant, a landlord is entitled to insist upon all his legal and equitable rights; the assignment does not deprive him of either.

Appellants, instead of prosecuting their claim against the assignee, saw fit to prove a claim against the estate for the

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entire rent due and prospective; that is, seem to have elected to make claim as general creditors of the estate, instead of suing the assignee upon his liability. This claim against the estate has been allowed, and appellants are entitled to *pro rata* dividends.

There is no evidence that the court directed the assignee to retain or use these premises, or approved of his so doing; the court was, therefore, not bound to allow appellant's claim as a part of the expense of administration.

At the time of the assignment the total rent due, and to become due was \$1,540. Appellants filed a claim for this sum and \$100 attorney's fees; for this aggregate, \$1,640, their claim has been allowed. It now appears that the assignee has for the time he occupied the premises paid them \$317; deducting this from \$1,640 leaves the sum of \$1,323, to which sum appellant's claim as general creditors should be reduced, and upon this sum of \$1,323 appellants are entitled to *pro rata* dividends, without a deduction of the \$317 therefrom.

The judgment of the County Court is reversed, and the cause remanded, with directions to that court to enter orders in accordance with this opinion. Reversed and remanded, with directions.

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Milford J. Thompson v. Economy Furniture Company.

1. **ABSTRACTS—How Considered.**—The abstract of the record must, as against the appellant, be deemed sufficiently full and accurate to present all the errors upon which he relies.

Trespass, de bonis asportutis. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

THOMPSON & McCASLIN, attorneys for appellant.

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E. A. SHERBURNE, attorney for appellee, contended that the appellant has not saved exceptions to the acts or rulings assigned for error. To be sure, there are numerous ejaculatory objections, and exceptions which appear in the record and abstract, in the following form:

“Objection; overruled; exception.” “Who objected; to what? Who excepted; to what? does not appear. This is not sufficient to raise any question in this court. Arcade Co. v. Allen, 51 Ill. App. 305; Rogers v. Hall, 3 Scam. 6.

Nor is any reason stated for the “objection.” Here is a fair sample of all the objections, on page nine of abstract, seventy-nine of record:

“Said mortgage introduced in evidence as plaintiff’s Exhibit B.”

“Objection; overruled; exception.”

What the mortgage was objected to for, whether because of informal acknowledgment, erasure, want of signature or some other reason, is not stated. This is too general for any purpose. Coffeen Coal Co. v. Barry, 56 Ill. App. 590.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant filed his abstract March 16th, his brief March 19th, and the brief of the appellee was filed March 24th, all in 1896.

The last brief truly quoted from the abstract, as the only exception which it shows that the appellant took in the Circuit Court, this sentence:

“When the defendant by his counsel entered the motion for new trial, and before the same was reduced to writing, and the reasons for such motion set forth and presented, the court overruled the same and entered judgment. To which defendant then and there duly excepted.”

Then the appellee holds up what we said in Wabash R. R. v. Smith, 58 Ill. App. 419, that “the abstract must, as against the appellant, be deemed sufficiently full and accurate to present all the errors upon which” the appellant relies.

If we enforce our rules in one case we must in all; other-

wise we do not administer the law impartially. It is quite possible that if we turned to the record we might find that the appellant did in fact make a motion for a new trial, a fact, if it be one, which the abstract omits to state. Reciting that "when the defendant by his counsel entered the motion for a new trial" is no allegation that such a motion was made.

Since the appellee filed his brief, a week—at this present writing—has elapsed, and the appellant has not asked to amend or add to his abstract "To which"—to what? *Flaningham v. Hogue*, 59 Ill. 315.

The judgment is affirmed.

Since the foregoing was written, six days have passed, and the only attention the appellant has given the case is that April 9th he filed a couple of pages of typewriting containing a quotation, as from the opinion of the Supreme Court in *Chicago, Milwaukee and St. Paul Ry. v. Walsh*, 150 Ill. 607, of language not there; and impressively stating that it "becomes the duty of this court to examine the entire record and determine whether as a matter of law arising from the facts, the judgment was a proper one;" by which it would seem that this court, and the Appellate Courts of the other districts, and the Supreme Court, have evaded their duty in declining to go to records for matters not shown by abstracts, and they ought to be ashamed of themselves.

MR. PRESIDING JUSTICE GARY ON PETITION FOR REHEARING.

This petition is for the purpose of bringing the case before us by a better record and abstract; citing Supreme Lodge K. of H. v. Dolberg, 138 Ill. 508, in which case this court had refused such a petition. The then action of this court was consistent with all its subsequent action upon like premises. *Steinfeld v. Taylor*, 51 Ill. App. 399, and many cases since.

It was also in accord with the practice of the Supreme Court. *Boynton v. Champlin*, 40 Ill. 63; *Haskin v. Haskin*, 41 Ill. 197; *McPherson v. Nelson*, 44 Ill. 124.

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In this last case the evil consequences of departing from the practice so established are forcibly stated.

In Haskin v. Haskin, the counsel agreed that the omission was not mine, but by the clerk in copying, yet the Supreme Court would not—as is shown in the note to Boynton v. Champlin—reinstate the case. Petition denied.

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National Home Building and Loan Association v. Mollie O. McAllister et al.

1. **MECHANIC'S LIEN—Construction of the Statute—Statement as to Time, etc.**—Sections 4 and 28 of the mechanic's lien act, are *in pari materia*, and are to be construed together. In order that a contractor may enforce a lien under them, the statement provided by section 4 to be filed by him must set forth particularly the time when the material was furnished or labor performed.

2. **SAME—To Whom the Statute Applies.**—Sections 4 and 28 of the mechanic's lien act apply to the original debtor with whom the contract was made, as well as to creditors, purchasers and incumbrancers.

3. **SAME—A Sufficient Statement.**—A statement that the materials and work were furnished between certain dates, as, having been begun “on the 29th day of July, 1893, and completed on the 8d day of December, 1893,” is a sufficient compliance with the statutory requirement in regard to time.

4. **SAME—As to Parties not Complaining.**—When a lien is defective for a non-compliance with the statute relating to the statement to be filed, it will, notwithstanding, not be set aside as to parties in interest not complaining.

BILL for Mechanic's Lien.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed in part and reversed in part with directions. Opinion filed April 27, 1896.

CUTTING, CASTLE & WILLIAMS and JESSE R. LONG, attorneys for appellant.

A contractor, in order to maintain his mechanic's lien for work done, or material furnished, must act in good faith toward all persons interested in the property involved, and an act upon his part which would make it unjust and inequi-

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table to enforce his lien, may operate as an estoppel to its enforcement in a court of equity. *Heidenbluth v. Rudolph*, 152 Ill. 320.

The statement filed under section 4 of the lien act, must show the times when the material was furnished, or there is no lien, even against the owner. *Field v. Blanchard*, 58 Ill. App. 624; *McDonald v. Rosengarten*, 134 Ill. 126; *Campbell v. Jacobson*, 145 Ill. 389; *McIntosh v. Schroeder*, 39 N. E. Rep. 478.

A verified statement of the time when the material was furnished is one of the statutory requirements. *O'Brien v. Krockinski*, 50 Ill. App. 460.

The document to be filed with the clerk is required to set forth the times when the material was furnished. *McDonald v. Rosengarten*, 35 Ill. App. 76.

A serious difficulty with the statement in this case is, it wholly fails to set forth the times when such material was furnished, or labor performed. That it should set forth these facts seems to be an imperative requirement of the statute. A mechanic's lien does not exist, and is not enforceable, of common right, but it is purely a statutory lien, and can be maintained only on those conditions which the statute imposes. *Campbell v. Jacobson*, 145 Ill. 389 (403).

If the statement fails to set forth the times when the materials were furnished, or work done, it is fatally defective. *Coleman's Mechanics' Liens*, p. 69, Sec. 112.

The mechanic's lien law is strictly construed in this State, and the courts have uniformly so held. *Cary-Lombard Lumber Co. v. Fullenwider*, 150 Ill. 629; *Campbell v. Jacobson*, 145 Ill. 389; *Ostrander v. Tobel*, 56 Ill. App. 381.

All the particulars required to be stated in the notice creating the lien are material. The omission of any of these particulars required by the statute to be stated is fatal to the lien. 2 *Jones on Liens*, Sec. 1390.

When the claim must state the time when the materials were furnished, or the work was done, this requirement must be complied with; otherwise the claim will be defective. *Phillips on Liens*, Sec. 359.

The statement for a mechanic's lien should set forth the

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time when the materials were furnished. Am. & Eng. Ency. Vol. 15, p. 147; Wade v. Reitz, 18 Ind. 307; Goss v. Trelitz, 54 Cal. 640; Butler & McCracken v. Gain, 128 Ill. 28; Belanger et al. v. Hersey et al., 90 Ill. 70; Ency. of Pleading and Practice, Vol. 4, p. 748; City of Rock Island v. Cuinely, 126 Ill. 408; Blanck v. Pausch, 113 Ill. 60; Graff v. Aukenbrandt, 124 Ill. 51.

CHARLES LANE, attorney for John M. Graff, William M. Seymour and John H. Forshaw, doing business under the firm name and style of Graff & Co.

The courts of our State have never held that where there is a definite contract to do an entire job, such as the contract made by Graff & Co. and Mollie O. McAllister, it is necessary, in the statement of claim for lien, to itemize the materials and labor going into the job. The courts of many of the States hold that it is not necessary to so itemize. Jones on Liens, Sec. 1406; Baptist Church v. Trout, 28 Pa. St. 153; King v. Smith, 42 Minn. 286; Sexton v. Weaver, 41 Mass. 273.

While it may be conceded that they hold that the mechanic's lien statute is to be strictly construed, yet it was held in the case of Campbell v. Jacobson, 145 Ill. 389, that the requirements of the statute in regard to the notice of claim for lien will be met if a substantial compliance in that regard is had. In other words, the Supreme Court of our State does not regard strict construction and substantial compliance as necessarily irreconcilable and antagonistic. The courts of other States have also held that a substantial compliance with a mechanic's lien statute will suffice. Certainty to a common intent is all that is necessary. Baptist Church v. Trout, 28 Pa. St. 153; Ryan v. Klock, 36 Hun 104; Granite Co. v. Devereux, 72 Me. 422; King v. Smith, 42 Minn. 286; Jones on Liens, Sec. 1404; Phillips on Mechanics' Liens, Sec. 16; Knabb's Appeal, 10 Barr. (Pa.) 186.

MR. JUSTICE SHEPAED DELIVERED THE OPINION OF THE COURT.
This was a bill filed by appellants to foreclose a mortgage

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made by the appellee, Mollie O. McAllister. The appellees, John M. Graff, William M. Seymour, and John H. Forshaw, copartners under the name of Graff & Company, were made parties defendant with the mortgagor, and answered asserting their right to a mechanic's lien upon the mortgaged premises.

The decree that was entered found that there was due to the appellant \$15,801.86 upon its mortgage, and that there was due to Graff & Co. \$607.30, for which they were entitled to a mechanic's lien against the mortgaged premises; that the whole value of the mortgaged premises was \$15,000, of which the land was \$4,000, and the improvements \$11,000; that the sum due to complainants was a first lien on the land, but as to the improvements it was second and subject to the lien of Graff & Company for said sum so found to be due them.

This appeal questions the correctness of the decree in the matter of priority, as between the appellant and Graff & Co., and nobody but the appellant complaining in such regard, we shall consider only what affects that single question.

The contract of Graff & Co. with reference to the premises in question was to furnish and set up "four hot blast furnaces" in the building which constituted the improvement upon the mortgaged land.

The affidavit which formed a part of the statement of claim for mechanic's lien filed in behalf of Graff & Co., in purported compliance with Sec. 4 of the mechanic's lien act, in force at the time of filing such statement, states: "That the work in connection with the furnishing and the erection of the said furnaces for the said Mollie O. McAllister was commenced on the 10th day of August, 1893, and completed on the 3d day of December, 1893, as set forth in the said statement, marked Exhibit A, as aforesaid.

Affiant further says that the amount of said statement, marked Exhibit A, and made a part of this affidavit, as aforesaid, was due on the completion of the work connected with the furnishing and erection of the said furnaces in the said flat building of the said defendant, Mollie O. McAllister," etc.

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The statement in said Exhibit A, as to the time of doing the work was as follows:

“The work in connection with the furnishing and erection of the said four hot blast furnaces in the said building having been commenced on the 29th day of July, 1893, and completed on the 3d day of December, 1893.”

The provisions of sections 4 and 28 of the mechanic's lien act, are, so far as is material in this connection, as follows:

“Sec. 4. Every creditor or contractor * * * shall file with the clerk of the Circuit Court * * * a just and true statement or account or demand due him, after allowing all credits, setting forth the time when such material was furnished or labor performed.

Sec. 28. No creditor shall be allowed to enforce a lien created under the provisions of this act, as against or to the prejudice of any other creditor or incumbrancer or purchaser, unless a claim for lien shall have been filed with the clerk of the Circuit Court, as provided in section 4 of this act.”

These two sections are *in pari materia*, and are to be construed together.

And in order that a contractor may enforce a lien under them the statement provided by section 4, to be filed by him, must set forth “as therein particularly described,” the time when the material was furnished or labor performed. *McIntosh v. Schroeder*, 154 Ill. 520.

And it was held in the last cited case, following *Campbell v. Jacobson*, 145 Ill. 389, although without referring to that former decision, that the two sections apply to the original debtor with whom the contract was made, as well as to creditors, purchasers, or incumbrancers.

The holding has been uniform that a statement of *the time* when the materials were furnished, is one of the requirements of the statute. *McDonald v. Rosengarten*, 134 Ill. 126; same case, 35 Ill. App. 71; *Fried v. Blanchard*, 58 Ill. App. 622; *O'Brien v. Krockiniski*, 50 Ill. App. 456.

A statement, therefore, like that in this case that the materials and work were furnished between certain dates, or,

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as having been begun "on the 10th day of August, 1893, and completed on the 3d day of December, 1893," as said in the affidavit, and as commenced on the "29th day of July, 1893, and completed on the 3d day of December, 1893," as said in the statement accompanying the affidavit, is not a compliance with the statutory requirement in regard to time.

No one, except the appellant, finding fault with the decree, it will be affirmed in so far as the lien of Graff & Company is thereby established against the premises, but in so far as that lien is given priority upon the improvements over the lien of appellant, the decree must be reversed, a reversal to that extent seeming to be all that appellant is entitled to, and the cause is remanded to the Superior Court, with directions to enter a decree accordingly, and give to appellant a first lien upon both land and improvements. Affirmed in part, and reversed in part, and remanded with directions.

ADDITIONAL OPINION BY MR. JUSTICE SHEPARD.

Since the foregoing opinion was filed we have seen the opinion of the Supreme Court in *Blanchard v. Fried*, filed May 12, 1896, and recognizing the spirit of the decision there announced to be opposed to the views we have expressed in regard to the statement of the time when the materials and work were furnished and performed, we retract our holding in that regard, and hold that the statement, or claim for lien, was sufficient.

So holding, necessitates our consideration of another question. The contract between Graff & Co. and Mollie O. McAllister was in the form of a written proposition and acceptance to do the work for \$600, on which \$50 was paid.

At the time of contracting for the furnaces, Graff & Co. made an agreement with one A. E. Mick, who was the step-father of the appellee, Mollie O. McAllister, and her agent in the matter, as follows:

"Chicago, July 31, 1893.

This memorandum witnesseth, that Graff & Company have sold to Mollie O. McAllister four furnaces, including hot air

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stacks, pipes and registers, to put in building 7040 and 42 Eggleston avenue, through her agent, A. E. Mick, said work to be done for six hundred dollars. We further agree to pay said A. E. Mick two hundred dollars as commission as agent for making the said sale of four furnaces, per their proposition, signed July 29, 1893.

GRAFF & Co.,
Smith & Bright, Managers,
Per Frank Tully."

Regarding this commission contract, Frank Tully, who signed it for Graff & Co., and represented them in the matter, testified as follows:

"Q. Will you state how you happened to make this contract with Mr. Mick? A. They (Mollie McAllister and Mick) were building this particular house and three others, and they were to have heating apparatus in each of them. I wanted to get the contract for all of the work, but he said it was not possible for him to give me the contract for all the houses at the present time, and he gave me the contract for this one, and then as the building progressed, he would make another contract for each of them, and would give me the work on them, making twelve furnaces in all, and there was a question arose about one of the buildings for heating by steam, and then the question of commissions came up in regard to the amount of commissions to be paid on this work, and we agreed upon it, which was this amount here I think, \$200; but he had some personal matter that he had to take care of right away, and this first payment—this first contract I mean—and when we closed the contract for the remainder of the buildings, we would get the payment in full, although there was to be no commission out of that.

Q. In other words, you agreed, as I understand it, to pay him \$200 in consideration of his securing for you contracts for putting in furnaces, not only in the building on the premises involved in this suit, but any other building. A. There was other buildings, four altogether.

Q. Was that the distinct and exclusive and only consideration supporting that agreement? A. Yes, sir."

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It thus appears that the contract price of \$600 for which Graff & Co. agreed to furnish the four furnaces in question, included a commission of \$200, to be paid to the agent of Mollie O. McAllister for materials to go into the three other buildings, as well as into the one in question.

It would be manifestly inequitable to allow to Graff & Co. a lien, as against the appellant, which shall include such commissions, and it can not be held, either, that the statute contemplates a lien for any such object as against third parties. *Heidenbluth v. Rudolph*, 152 Ill. 316.

The decree was right in all respects except as to the amount found to be due to Graff & Co. Such amount was the balance of \$550, with interest from December 3, 1893, aggregating \$607.30 at the date of the decree. That amount should be lessened by the sum of \$200, and interest thereon from December 3, 1893, to the date of the decree on January 6, 1896, amounting to \$220.90.

The point is made that the "work" that was done, etc., includes only the labor, and not the materials, but we regard that as having too technical and constrained a construction.

The decree is therefore reversed, and the cause remanded, with directions to the Superior Court to enter a new decree in all respects like the one appealed from, except by reducing the amount thereof in accordance with this opinion.

Reversed and remanded, with directions.

MR. PRESIDING JUSTICE GARY.

Regarding the opinion in *Blanchard v. Fried* referred to by Judge Shepard as being a step in the right direction, and in accord with what I said on my own account in the case as reported in 58 Ill. App. 622, I concur in the foregoing retraction, though I believe it to be contrary to *McDonald v. Rosengarten*, 134 Ill. 126.

[Since the foregoing was written the advance sheets of decisions of the Supreme Court, issued as part 2 of Vol. 161, have come to hand, containing a report of *Springer v. Kroeschell*, at page 358, where an exception which we declined to consider (see 59 Ill. App. 484) is considered by the Supreme Court, and the ruling as to the sufficiency of a statement (p. 395) is in accord with our last opinion upon the subject.

Sweeney v. Kaufmann.

Bridget Sweeney and John Sweeney v. Joseph Kaufmann.

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1. **CONTRACTS.**—*Election in Case of Default.*—An agreement to pay money in installments, with a condition that in case of default in payments at the time mentioned, then the whole amount should become due and payable, is valid.

Bill of Foreclosure.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

ALLAN C. STORY and FRED. W. STORY, attorneys for appellants.

ROSENTHAL, KURZ & HIRSCHL, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

June 16, 1892, persons not before us, made their promissory note, payable to the order of themselves two years after that date for the sum of \$2,250, and indorsed it to the appellee. The makers executed a deed of trust in the nature of a mortgage to secure the payment of the note with \$200 attorney fees in case of foreclosure.

The appellant Bridget bought the premises, and June 10, 1894, the appellant John indorsed upon the note as follows:

“In consideration of the extension of the payment of the within note as follows: \$250 due in six months, \$2,000 due in one year, from June 16, 1894, I hereby assume and agree to pay the within note on maturity, with interest at the rate of seven per cent per annum, payable semi-annually, and in default of the payment of any of the interest or the principal at the time above mentioned, then the whole amount shall become due and payable.

JOHN SWEENEY.”

The \$250 due in six months from June 16, 1894, that is, December 16, 1894, not being paid, the appellee, February 13, 1895, filed this bill, on which he has obtained a decree of foreclosure for the amount due for principal and interest, with \$200 attorney fees and costs.

No multiplying of words would make the propriety of that decree more apparent than it is on a dry statement of the facts, and the decree is affirmed.

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Hyde Park Thomson-Houston Light Company v. Alfred R. Porter.

1. **NUISANCES—Permanent Damages—One Recovery.**—An action for damages resulting from the operation of an electric light plant in proximity to the plaintiff's dwelling may be maintained, and if the damages proved are of a permanent character, but one recovery can be had.

2. **PLEADINGS—Sufficient Allegations.**—An allegation that the defendant "wrongfully and injuriously erected and built" the building, and therein "wrongfully built, located, constructed and kept and continued" certain electric light plants, and "wrongfully and injuriously operated" the same to the permanent injury, damage and depreciation of the plaintiff's premises, is a sufficient allegation under which to make proof, not only of the damage suffered from the erection, but also from the operation of the plant, past, present and prospective.

3. **ACTION FOR TORTS—Allegations and Proofs.**—Where averments in actions of tort are that by several causes damages have accrued, the proof of some of the causes which are sufficient as a cause of action will sustain the action.

4. **DAMAGES—Operation of Electric Light Plants.**—One person can not construct what by its operation will inevitably injure adjacent premises and then sell out to another who can, because he did not build the construction which creates the damages only by being operated, escape liability for his injurious operation of the thing built.

Trespass on the Case.—Damages from the operation of an electric light plant. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

R. S. THOMPSON, attorney for appellant.

Hyde Park Thomson-Houston Light Co. v. Porter.

No appearance for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an action on the case, brought by the appellee against the appellant to recover damages for depreciation in the value of appellee's lot and residence, adjoining the electric light plant of the appellant, situated near the corner of 53d street and Cornell avenue, in the city of Chicago.

The declaration, which comprised three counts practically alike, except as to their descriptions of the electric plant and the plaintiff's property, is, briefly, to the effect that the plaintiff owned a certain lot and residence; that the defendant corporation erected and operated an electric plant on its property adjoining plaintiff's said lot; that the electric plant cast smoke, dirt, etc., upon his property, filled the air thereabout with noxious odors, etc., and caused his house and property to shake, tremble, jar and vibrate, whereby * * * plaintiff's premises have been and are thereby greatly and permanently damaged and depreciated in value in the sum of \$6,000.

To this declaration defendant pleaded the general issue, and a trial was had before the court and a jury, resulting in a verdict and judgment for \$2,000, in favor of the plaintiff, the appellee here.

The jury also found specially, in answer to special interrogatories submitted to them, as follows:

“Is there a permanent injury to the plaintiff's property caused by the construction and operation of the electric plant in this case? Yes; by operation.

Was the property of the plaintiff permanently injured by the erection and operation of the electric plant, as the evidence shows the same to have been erected and operated in November, 1890? No.

Was the market value of the property of the plaintiff depreciated in the market in November, 1890, by the erection and operation of the electric plant? To some extent.

If the jury find from the evidence that the plaintiff has

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sustained damages as alleged in the declaration, they are instructed to answer the following interrogatories as to special findings:

1. Are the damages awarded to plaintiff as and for permanent injuries? Yes.
2. Has the property of the plaintiff, described in the declaration, been permanently injured by reason of the construction and operation of the electric light plant described in the declaration? Yes; by operation."

The appellant says:

"This appeal raises simply two points. First, that this action, which is for permanent injuries, should have been brought against the defendant's predecessor in title, and not against the defendant, as the electric light plant, whose construction and operation is claimed to have depreciated the value of the plaintiff's adjoining property, was not constructed or put in operation by the defendant, but by another company, from whom the defendant afterwards purchased. Second, that if, as is claimed by the plaintiff (but denied by defendant), the defendant is liable to the plaintiff for any injuries to his property arising from the continuance of the operation of said plant by the defendant, such damages must be confined to the period between the time the defendant purchased the plant and the commencement of the action, a period of four months, as to which there is no evidence to support the verdict."

And the case is argued upon those two propositions.

No brief having been filed in behalf of the appellee it rests upon us, unaided by the appellee, to determine whether the presumptions existing in favor of the judgment have been overborne by the appellant.

That an action for damages of this character may be maintained is not to be disputed, nor if the damages proved are of a kind permanent in character, that but one recovery can be had. Ottawa Gas Light and Coke Co. v. Graham, 28 Ill. 73; Illinois C. R. R. Co. v. Grabill, 50 Ill. 241; Chicago & A. R. R. Co. v. Maher, 91 Ill. 812; Decatur Gas Light Co. v. Howell, 92 Ill. 19; Chicago & E. I. R. R. Co.

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v. Loeb, 118 Ill. 203; Chicago & E. I. R. R. Co. v. McAuley, 121 Ill. 160; Ohio & M. Ry. Co. v. Wachter, 123 Ill. 440; Chicago Forge & Bolt Co. v. Sanche, 35 Ill. App. 174.

The appellee's premises constituted his home, and the house was built in 1888. The light plant was begun in the summer of 1890, and was completed in the fall of that year. After "it had been running a month or two" it was sold to the appellant, who took possession and began to operate it on December 4, 1890.

The suit was begun April 29, 1891, and the trial took place in November, 1894.

The allegation of the declaration that the defendant "wrongfully and injuriously erected and built" the building, and therein "wrongfully built, located, constructed, kept and continued" certain electric plants, and "wrongfully and injuriously operated" the same to the permanent injury, damage and depreciation of the plaintiff's premises, we regard as a sufficient allegation under which to make proof not only of the damage suffered by the plaintiff from the erection, but also from the operation of the plant, past, present and prospective.

So much of the allegation as charged the appellant with the erection of the plant, may be disregarded. Where averments in actions of tort are that by several causes damages accrued, the proof of some of the causes which are sufficient as a cause of action will sustain the action.

As said in *City of Rock Island v. Cuinely*, 126 Ill. 408: "In actions of tort it by no means follows that every allegation of matters of substance must be proved. In general, it will be sufficient if enough of the facts alleged in the declaration are proved to constitute a cause of action;" and, quoting from *Chitty's Pl.*, it is added: "In torts the plaintiff may prove a part of his charge if the averment is divisible, and there be enough proved to support his case."

The gist of this action was the operation of the plant, and not its erection, and its operation by the appellant was sufficiently averred and proved.

This is not the case of one who has purchased premises

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after the damage has been done, as were some of those cited, but is one brought by the owner of the premises at the time the injury complained of had its inception, and who remained such owner.

The injury sustained, as proved and as found by the jury, consisted in the operation of the plant.

It would be a manifest evasion of justice to hold, under the declaration, that because the appellant's predecessor built the plant, the appellant is not liable for its injurious operation; and to hold that the appellant is liable for injuries done only between the time when it purchased from its predecessor and the date of the commencement of the suit, when the appellee is confined to a single action for his permanent damages, would be to deny him any practical, relief. *O. & M. Ry. Co. v. Wachter, supra.*

May one corporation construct what, by its operation, will inevitably injure adjacent premises, and then sell out to a successor who shall, because it did not build the construction which creates damage only by being operated, be rid of liability for its injurious operation of the thing built?

We do not understand the law to be that way. The damages may have had their inception when the plant was first constructed, and during the month or two of its partial operation prior to appellant's purchase of it, and it might be that the statute of limitations would then have begun to run, as in the case of *C. & E. I. R. R. Co. v. McAuley, supra*, but the jury specially found what we regard the evidence as supporting, that no permanent injury, to an appreciable degree, of the kind complained of, occurred during that period of time.

It was not the erection of the building itself, nor the mere putting into it of machinery, which gave the right of action, but it was from its operation, whereby dirt, dust, ashes, etc., were cast upon plaintiff's premises, and jarring and vibrating produced, that the damage ensued.

Counsel makes no complaint concerning the instructions, but insists that there is an inconsistency between the special findings and the general verdict.

Smith v. Ainsworth.

What we said in *Independent Dryer Co. v. Livermore Foundry Co.*, 61 Ill. App. 390, controls us, and we are unable to see any such irreconcilability between the findings and the general verdict as to take this case out of the rule.

The judgment will be affirmed.

MR. JUSTICE WATERMAN did not participate in this case.

Fred M. Smith v. C. E. Ainsworth et al.

1. **VENDOR AND VENDEE—Power to Reject Goods.**—If any act is done by the buyer which he would have no right to do, unless as owner of the goods, he can not subsequently reject the goods.

Assumpsit, for goods sold. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

JOHNSON & MORRILL, attorneys for appellant.

PADEN & GRIDLEY, attorneys for appellees.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

These parties deal in fish; the appellant in Chicago, the appellees at Sault Ste. Marie, Michigan.

The matter in suit is shown by correspondence as follows—first, a letter:

“ SAULT STE. MARIE, Mich., May 16, 1892.

F. M. Smith, Chicago.

DEAR SIR:—We would like to deal with you this season in fish and make the same arrangement that we have with our other customers. To have a standing order from our customers and when our prices are not satisfactory to notify us, and we can then accept the price or discontinue shipments. We deal with Sloan, Lewis & Lehrkind, Booth, and

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others in this way. We are now billing white fish at six cents, trout at five cents.

Yours respectfully,
AINSWORTH & GANLEY."

Then another letter:

"CHICAGO, May 18, 1892.

Ainsworth & Ganley, Sault Ste. Marie, Mich.

DEAR SIRS:—In reply to your esteemed favor of the 16th inst., I have all my arrangements made for fish for this season, and thank you for your offer, but don't think I can do anything with your house this summer.

Yours respectfully,
F. M. SMITH."

Then a telegram:

"May 19, 1892.

Dated Chicago, Ill., 19.

To Ainsworth & Ganley:

Ship first boat, small car, largest white. Make price low as possible. See letter. Answer.

F. M. SMITH."

Then another telegram:

"May 20, 1892.

To F. M. Smith & Co., Chicago, Ill., 8 Dearborn St.:

Will ship you a car to-morrow, extra fine white, about three pounds.

A. & G."

Then a postal card:

"CHICAGO, May 20, 1892.

Ainsworth & Ganley, Sault Ste. Marie, Mich.

Your telegram received, notifying me of shipment of car white. You may ship another, if fish are good size, when the next boat leaves, and wire when you ship.

Yours respectfully,
F. M. SMITH."

Then another letter:

"CHICAGO, May 20, 1892.

Ainsworth & Ganley, Sault Ste. Marie, Mich.

DEAR SIRS: I wired you last night to ship me, on first boat, one car largest white, and make price as low as pos-

Smith v. Ainsworth.

sible, and received your wire to-day, saying you would ship.

It seems that there was a letter written to you a few days ago, in which the statement was made that I had my arrangements made for fish this summer. This was an error and done without my knowledge. I shall probably buy a good quantity of fish from your house this season, if you can supply me regularly and prices are right, so keep me posted.

Yours truly,

F. M. SMITH."

Then another telegram:

" May 23, 1892.

To F. M. Smith, 8 Dearborn St., Chicago.:

Two cars fish on the Gould this morning.

A. & G."

Then another telegram:

" May 25, 1892.

Dated Chicago, Ill., 25.

To Ainsworth & Ganley :

Ship no more fish till further orders.

F. M. SMITH."

Then an invoice:

" SAULT STE. MARIE, MICHIGAN, May 23, 1892.

F. M. SMITH & Co.

Bought of AINSWORTH & GANLEY.
Wholesale Dealers in Fish.

1992 white, car 50	\$119 52
1031 " 61 86	
243 " extra large 14 58	
448 trout 24 64	
25 sturgeon 1 00	
5 pickerel 20	
58 pike, car 121 2 90	
Return freight, 2 cars 6 00	
	<hr/>
	\$230 70"

Then another letter:

“CHICAGO, May 25, 1892.

Messrs. Ainsworth & Ganley, Sault Ste. Marie, Mich.

DEAR SIRS: Your two cars fish received this a. m., and what I have used of them so far are very nice and I am well pleased, but you are a little too high on price. The Buffalo Fish Co., of Buffalo, N. Y., are selling and offering elegant white fish at $5\frac{1}{2}$ cts. lb. f. o. b. Chicago, and I can buy all the trout I want at 5c. lb. here. This is the reason I wired you to-day to ship no more till further orders. If you can make prices to compete with others, I should like to place standing order with you. Please let me hear from you.

Yours truly,

F. M. SMITH.”

May 20, 1892, was Friday, and the “Gould” should have sailed from the Sault the next morning, but was delayed, and did not sail until the next Monday morning; which is the explanation by the appellees why they sent two cars on her in accordance, as they believed, with the wish of the appellant, expressed in his dispatch of May 20th. May 27, 1892, the appellant wrote a letter, attempting to withdraw what we hold to be an acceptance of the fish by his letter of May 25th.

Holding that attempt to withdraw ineffectual, cuts off all the defense that the appellant tried to make, and the judgment for the appellees is affirmed.

That the court would not allow the appellees the return freight they charged in the invoice, and but five cents a pound for trout, is no ground of complaint by the appellant.

The administration of the law is practical, not metaphysical. Affirmed.

Augustus Sparr et al. v. William W. Sutherland.

1. APPELLATE COURT PRACTICE — *Abstract Must Show Error.*— Where an examination of the abstract shows no prejudicial error the judgment will be affirmed.

Brewer v. Nat. Union Building Ass'n.

Assumpsit, for goods sold. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

WILLIAM PETTIS, attorney for appellant.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit brought to recover the price of a carload of lumber sold to appellants.

The defense was a claim for damages for failure to ship fourteen car loads of lumber alleged to have been contracted for by appellants.

The court found that no such contract was proven, and in this conclusion we agree.

We do not find from an examination of the abstract that any prejudicial error was committed by the court in admitting in evidence papers offered by appellee, or that any error warranting a reversal of the judgment is shown. The merits are clearly with appellee.

The judgment of the Circuit Court is affirmed.

Simon W. Brewer v. National Union Building Association.

1. RELEASE—*What is Not Sufficient*.—Writing the word “canceled” across a lease by the officers of a building association is not, of and by itself, sufficient to release the tenant from paying rent.

2. FORMER DECISIONS—*As to Cases in the Appellate Court*.—For the lower court and for the Appellate Court on a second appeal, the decision on the first appeal is the law of the case.

3. APPELLATE COURT PRACTICE—*Insufficient Briefs*.—Upon a brief that the several instructions asked should have been given, and that such proposition requires no citation of authorities, the Appellate Court is not required to examine the instructions in question.

4. MOTIONS FOR NEW TRIALS—*When Waived*.—A motion for a new trial is waived by the neglect of the party making it to present his reasons to the court for granting it.

64	161
68	500
69	600
69	623
166	231
64	161
91	567

5. **TRIALS—Parties Acting as their Own Attorneys.**—A party may conduct his own case without the aid of an attorney, but in so doing he is not relieved from observing the rules of proceeding which attorneys are required to observe.

6. **PRACTICE—On Offers of Testimony.**—To make the exclusion of offered testimony error, the offer must state what the testimony is expected to prove.

Assumpsit, for rent. Appeal from Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

ALLAN C. & F. W. STORY, attorneys for appellant.

HAMLINE, SCOTT & LORD, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant for rent. The case was here in 1891, and, with the title reversed, is reported in 41 Ill. App. 223.

In accordance with the opinion of this court as there reported, the court on the last trial instructed the jury that the word "canceled," written by the officers of the appellee across the lease, "was not of and by itself sufficient to release the" appellant from paying rent. In this there was no error.

First, because the law is so, if we had never decided it in the case as reported, and for reasons there stated; and second, because for the lower court and for this court on a second appeal, the decision on the first appeal is the law of the case, right or wrong. *Field v. Brokaw*, 40 Ill. App. 371; *Central Warehouse Co. v. Sargeant*, 40 Ill. App. 438; *Whitesides v. Cook*, 43 Ill. App. 183.

The brief of the appellant says "that the several instructions (which cover three pages of the abstract) asked by the defendant should have been given, and that this proposition requires no citation of authorities," and thus drops the subject.

We are not required to examine the instructions upon such a brief.

Brewer v. Nat. Union Building Ass'n.

It might as well have omitted any mention of them. *Cook v. Moulton*, 59 Ill. App. 428.

The appellant filed a motion for a new trial, for a page (in the abstract) of reasons, and supported by two pages (in the abstract) of affidavits, which was denied November 20, 1895. The record states that denial thus:

“Afterward, to wit, on the 20th day of November, A. D. 1895, and still of the said term, said motion for a new trial came on to be heard in its regular order, both parties being represented by counsel, said affidavits and said grounds of said motion for a new trial, however, were not, nor was either or any of them, read or called to the attention of the court, and said court denied the motion and entered judgment on said verdict in favor of the plaintiff and against the defendant, as elsewhere appears, to which said decisions of the court, and to each thereof, the said defendant by his said counsel did then and there duly except.”

In *Penn v. Oglesby*, 89 Ill. 110, it is said that the practice of overruling a motion for a new trial *pro forma* “should not be indulged.” There the *pro forma* part was the act of the court, and the party had the right to complain; here, it is the act of the party, and he has no right to complain.

The principle of *Hintz v. Graupner*, 138, Ill. 158, followed here in *Hoffmann v. World's Col. Ex.*, 55 Ill. App. 290, and *Geist v. Pollock*, 58 Ill. App. 420, is applicable. *De non apparentibus et non existentibus eadem est lex.*

The court was right in refusing a new trial for which the appellant offered no reason. Ten days later he moved the court again to grant a new trial for the same reasons, which motion was not decided until December 7, 1895, when the attorney of the appellant presented an additional affidavit in regard to the movements of himself and his watch on the sixth day of November, 1895, which the court declined to hear, and overruled the motion.

In this was no error. The court was not to be so trifled with.

As the record was when originally filed here—and we

will treat it as yet so remaining—it appears that the case was tried November 6, 1895; that the noon recess was until 1:45 p. m.; that the appellant came, but his attorney did not; that the case of the appellant was not yet closed, and that the appellant took the witness stand, and the court said to the attorney of the appellee, "You may proceed to the jury," and the appellant said, "Can't I be permitted to testify, your Honor?" to which the court replied, "No, your attorney is not here, and we can't wait any longer," to which ruling the appellant excepted.

Undoubtedly a party may conduct his own case without the aid of an attorney, but he is not relieved from rules of proceeding which his attorney would be required to observe.

One of those rules is, that to make the exclusion of offered testimony error, the offer must state what the testimony is expected to be. *Gaffield v. Scott*, 33 Ill. App. 317.

Here was no such offer.

We need not, therefore, pass upon the motion to strike out the amendment to the record, nor comment upon the great inconvenience of permitting one person to occupy at the same time the place of witness and advocate; thereby—unless he questions himself, in which case the questions would be always subject to the objection that they "suggest to the witness the answer desired" (1 *Greenl. Ev.*, Sec. 434)—cutting off the opportunity of the adversary to keep out incompetent testimony. No error was committed in denying to the appellant an opportunity to talk to the jury as a witness without restraint.

Logically there is no objection to the proceedings below open to the appellant on this record.

Any objections not included among the reasons assigned on the motion for a new trial were thereby waived; and the motion for a new trial was itself waived by the neglect to present reasons to the court for granting it.

There is no error, and the judgment is affirmed.

Dean v. Chicago General Ry. Co.

Nathaniel C. Dean v. Chicago General Railway Company.

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199s 1528

1. **STREET RAILWAY COMPANIES—Are Common Carriers—Regulation of Fares.**—A street railway company is a common carrier of passengers for hire, the legislature has power to regulate its charges and may confer such power upon municipalities.

2. **CITY OF CHICAGO—Power to Regulate Street Car Fares.**—The city council of the city of Chicago has power to fix the rates of fare for the carriage of passengers.

Trespass on the Case.—Ejecting the plaintiff from the car. Error to the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed April 27, 1896.

STATEMENT OF THE CASE.

The Superior Court having sustained a special demurrer to the declaration in this case, and the plaintiff electing to stand by his declaration, his suit was dismissed with judgment against him for costs. The declaration is in two counts, and sets up that on a certain day the plaintiff got upon one of the cars of the defendant, which was then at Western avenue and running west on Twenty-second street to Crawford avenue—the defendant then being engaged in operating a line of street railway on said Twenty-second street from May street to Crawford avenue, in the city of Chicago, as a common carrier of passengers for hire. That then and for a long time prior thereto, there had been in the city of Chicago an ordinance, passed by the city council, of which section one contains the following words: “The rate of fare to be charged by any person, firm, company or corporation, owning, leasing, running or operating street cars or other vehicles for the conveyance of passengers on any street railway within the limits of the city of Chicago for any distance within the city limits, shall not exceed five cents for each passenger over twelve years of age,” etc.

The declaration charges that the plaintiff tendered the sum of five cents to the conductor of the car, who refused

to take it as in full payment of the fare, and demanded an additional cent, informing the plaintiff that the company had established a rule that the rate of fare should be six cents; this additional cent plaintiff refused to pay, and in consequence was ejected from the car by the conductor, who was in that behalf acting as the agent of the company. The plaintiff thereupon brought his suit for damages, and set up the foregoing, and in the first count of his declaration claimed the city council had the right to and did fix the compensation to be charged by the defendant; and in his second count that the city council had the right to and did fix the maximum amount which the defendant should charge as a reasonable compensation for its services as a common carrier.

The defendant demurred generally, and as special grounds for demurrer set up that no power had been conferred on the city council by the legislature to regulate the rates of fare, and that the legislature had conferred such power on the railroad and warehouse commissioners.

SMITH & BARTON, attorneys for plaintiff in error.

C. C. & C. L. BONNEY, LYMAN M. PAINE, attorneys for defendant in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

A street railway company is a common carrier of passengers for hire. C. C. Ry. Co. v. Engel, 35 Ill. App. 491; N. C. St. Ry. Co. v. Williams, 140 Ill. 275; N. C. St. Ry. Co. v. Wrixon, 51 Ill. 308; N. C. St. Ry. Co. v. Coit, 50 Ill. App. 640; N. C. St. Ry. Co. v. Cook, 145 Ill. 553.

June 26, 1890, the city council passed an ordinance which is still in force, section 1 of which is as follows: "That the rate of fare to be charged by any person, firm, company or corporation, owning, leasing, running or operating street cars or other vehicles for the conveyance of passengers on any street railway within the limits of the city of Chicago,

Dean v. Chicago General Ry. Co.

for any distance within the city limits, shall not exceed five cents for each passenger over twelve years old," etc.

The legislature has power to regulate the charges of common carriers. *Munn v. Illinois*, 4 Otto 113; *C., B. & Q. Ry. Co. v. Iowa*, 4 Otto 156; *Ruggles v. People*, 91 Ill. 256; *Same*, 108 U. S. 526.

As to limitations upon this power, see *Chicago, M. & St. Paul Ry. Co. v. Minnesota*, U. S. Supreme Court, 1890.

The legislature can confer such power upon the council

By clause 42, of Sec. 1, Art. 5, Chap. 24, R. S., the city council is given power "to license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation."

The Supreme Court in *Farwell v. Chicago*, 71 Ill. 269, speaking of this statute, says:

"It is designed to operate upon those who hold themselves out as common carriers in the city for hire, and to so regulate them as to prevent extortion, imposition and wrong to strangers and others compelled to employ them, in having their property or persons carried from one part of the city to another. This is a rightful exercise of the police power."

Defendant had no right to lay railway tracks in the streets of the city, or to operate cars thereto, except by permission of the city. In giving such permission, the city could prescribe such conditions as to rates of fare as it saw fit.

In the absence of any showing by defendant that it has directly or indirectly permission of the city to run cars in the streets and charge a higher rate of fare than is prohibited by the general ordinances of the city, we think the demurrer of appellee was improperly sustained.

We do not regard the railroad and warehouse act as applying to the operations of street railways within the limits of one city.

The judgment of the Superior Court is reversed and the cause remanded.

GABY, P. J.

This case has to me a suspicious aspect, perhaps because of some idiosyncrasy of my own, and not because of any feature of the case. If I desired the opinion of a court as to the rights and privileges of a street railroad, I should, in a declaration, set out under what terms it acquired the right and privilege of occupying the street with its track. I suspect this court is being played upon for some ulterior purpose. Such things are known to have happened, but I do not like to put upon record the names of cases in which it has been done. I concur in reversing the judgment, but warn whoever may be concerned, that no principle or doctrine must be taken as established by the decision of this case, beyond one of pleading upon the assumption that the whole subject-matter is fully stated in the declaration.

John W. Byers et al. v. Johnson County Savings Bank, etc.

1. **CONSIGNMENT—*Of Goods by Mistake—Rights of Consignee.***—The fact that goods are consigned, by mistake of a shipping clerk, in the name of a person other than the lawful owner, gives the consignee no right to apply the proceeds of the sale upon the pre-existing indebtedness of the person in whose name the goods were so consigned to such consignee.

2. **SAME—*Consignee—When Protected Against Mistakes, etc.***—Where goods are, through an error, consigned in the name of a person other than the owner, and the consignee, in ignorance of such fact, is induced by such appearance of ownership to part with something of value, or to change his position in some manner detrimental to himself, he will be protected.

Assumpsit, for money had and received. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

D. P. PHELPS, attorney for appellants.

Byers v. Johnson County Savings Bank.

ROSENTHAL, KURZ & HIRSCHL, attorneys for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The material facts of this case are not controverted. They are in substance that one Elliott, of Iowa City, Iowa, was a buyer and shipper of live hogs, and in the course of his business became indebted to the appellants, who were live stock commission merchants at the Union Stock Yards in Chicago, and also to the appellee bank in Iowa city.

The previous course of dealing seems to have been for Elliott to buy hogs from farmers and give his checks therefor drawn on the appellee bank, where he kept a running account, and to ship the hogs so purchased in his own name to the appellants for sale, and it was in that manner of dealing that his indebtedness to both appellants and appellee was created.

A time arrived, however, when the appellee declined to honor Elliott's checks for any more funds. Thereupon it was agreed between Elliott and appellee that Elliott should buy hogs for and ship them in the name of the appellee. The method so agreed upon and pursued, of buying and shipping hogs thereafter, was for Elliott to buy the hogs and give to the farmer from whom he made a purchase, a ticket showing the number and weight of the animals, and the price per pound, which ticket the farmer would take to the appellee bank where the amount would be figured and paid to the person named on the ticket as the seller, and then the hogs would be shipped by rail to the appellants in the name of the appellee, and appellants would account and remit the net proceeds to the appellee.

By such method Elliott handled none of the money paid for the hogs or received from their sale. The appellee, however, kept the account of the transactions in Elliott's name, charging him with all sums paid for hogs, with interest, and crediting him with all proceeds. If a profit resulted, it was not given to Elliott, but was applied in reduction of his old indebtedness to appellee, and if there

was a loss, which however, does not appear to have occurred, it would have increased such indebtedness.

Of this arrangement between appellee and Elliott, the appellants were informed by Elliott, and told that it would have to be pursued for a while; and it appears that appellee would not furnish money, whereby Elliott might continue in business, upon any other basis.

The arrangement so entered upon was pursued without deviation or trouble of any kind for several months, and included twenty or thirty distinct shipments of hogs.

Finally, and about the middle of August, 1894, the shipment in question was made. The hogs composing that shipment were purchased in the same way in the name of appellee, and were paid for by the appellee, and the station agent of the railway company was ordered to ship the hogs as the property of appellee to the appellants. Acting in pursuance of such directions, the station agent executed the usual receipt and live stock shipper's contract, signed by himself as agent, and in the name of the appellee as owner, wherein it was recited that the hogs in question were received of the appellee consigned to the appellants. Such receipt and contract was then delivered to Elliott's son, who accompanied the shipment to Chicago, as in charge of the same, but it does not appear what he did with it. Then to the conductor of the railway train that carried the hogs out of Iowa City, a way-bill of the hogs was delivered by the station agent, or his clerk, wherein the hogs were described as being consigned by Elliott, instead of by appellee, to the appellants. The station agent testified that he was directed to bill the hogs from appellee to the appellants, and that the circumstance of naming Elliott in the way-bill as consignor, was because of a mistake of the bill clerk, made in violation or neglect of his directions to the clerk to bill the shipment from appellee.

It does not appear that the appellants had any knowledge of the receipt and shipping contract which was delivered to Elliott's son, until long afterward. When the hogs reached Chicago they were delivered to appellants in pur-

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suance of the way-bill, and were sold by appellants and the net proceeds amounting to \$729.78 credited against the past indebtedness owing to them by Elliott, who was duly notified thereof.

This was done on August 15, 1894. Elliott at once informed appellee, and on the next day, August 16, 1894, appellee wrote to appellants, claiming the money as the proceeds of hogs shipped in its name, and belonging to it; to which letter appellants replied on August 17th, stating the fact that the hogs were not billed in appellee's name, and denying any appropriation of its funds.

The station agent paid the appellee the amount of \$729.78, and took an assignment of its claim, and this suit in appellee's name, for his use, was brought against appellants, and judgment for said sum of \$729.78 was recovered.

From such judgment this appeal has followed.

The appellants' chief contentions are, first, that the hogs belonged to Elliott, and not to appellee; and, second, that they being consigned by the proper owner to the appellants, the latter, being factors, had a lien upon the hogs for prior advances in past transactions, which lien could not be divested in favor of any equitable lien of the appellee, who had not taken and kept a continuous and visible possession.

The second contention has nothing left to rest upon if the first one fails. Under the proved facts, it can not be a matter of uncertainty that it was the intention of appellee and Elliott that the property in the hogs should belong to and remain in the appellee, from the time of their purchase to the time of their sale; and it was no less their intention that at least constructive possession of the hogs should remain in the appellee during all that time. We do not think that the mere circumstances of the manner of keeping the accounts and applying the proceeds should be permitted to control the main fact, that the hogs were, by their purchase, to become the property of the appellee, which was by all the other evidence clearly established.

It did not matter how the accounts were kept, if from the real circumstances a condition existed that stamped the

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transaction as one different from that which the accounts, as kept, might possibly be said to indicate. The real fact in such a case, when, as in this case, clearly proved, will control and prevail over the other theory, which the manner of keeping the accounts might tend to sustain.

Unless there was an intention, which it is clear there was not, to extend a credit to Elliott, the form in which the evidence of the transactions was kept, is of no consequence.

Under the method pursued, as well as by the real intention of the parties, there was never a moment of time in which Elliott had a right of property in the hogs; and if it be claimed that he ever for a moment had possession of them, there is no foundation for such a claim.

Nor did he ever even appear to have either property in, or possession of them, until, by the mistake of the bill clerk, his name, as consignor of them, was written upon the waybill.

Undoubtedly if the hogs had been in fact Elliott's property, the appellants would have been justified in applying the proceeds of sale upon his pre-existing indebtedness to them. The law in such a case would have followed the fact of ownership, just as it will follow the fact of another ownership to a different conclusion.

But the only reasonable conclusion from the evidence, which can be arrived at under the law, is that the hogs were the property of the appellee from the moment of their purchase to that of their sale. And that being so, the law will forbid appellants, into whose possession the hogs came, although they bore the outward semblance of being Elliott's property, from appropriating them upon a pre-existing indebtedness of Elliott to them.

It can not alter either the fact or the law, that by mistake the property appeared to be that of Elliott, and not of the appellee, unless the appellants were induced by such appearances of ownership in Elliott to part with something of value, or to change their position in some manner detrimental to themselves. Under the circumstance that the waybill came to appellant's hands showing that Elliott was the consignor, the appellants, in the absence of other evidence

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of ownership, might have been protected had they paid the proceeds to Elliott or to anybody else by his authority, but they could not, as against the true owner, apply the proceeds to liquidation of a pre-existing debt owing to them by Elliott.

The appellants parted with nothing on their faith and belief that the property belonged to Elliott, excepting the freight and charges paid by them and their own services, and for all which they were reimbursed, as they properly were entitled to be, by deducting the same from the gross receipts for which they sold the hogs.

By the judgment the appellants are required simply to pay the net proceeds of the transaction which remain in their hands, to the true owner of the property sold by them.

We do not follow the argument of counsel for appellants into the domain of conflicting liens as between the appellants and the appellee, for that question is eliminated from the case by the conclusion reached by us, that the hogs were the property of appellee, and that appellants have suffered no harm.

The evidence that was received, showing the transaction between the Bank and Elliott, was proper for the purpose of showing the very fact in issue of who the hogs belonged to.

There was no material error either in the giving of appellee's instruction, or in the refusal of appellants'.

The verdict was in accordance with substantial justice and the judgment ought to be affirmed, and it is so ordered.

George M. Benedict v. E. A. Berger et al.

1. PROMISSORY NOTE—*Payable to the Order of the Maker.*—An instrument in the form of a note, payable to the order of the maker, is not a note until indorsed and ordered paid by the maker, and delivered.

2. SAME—*Indorsers not Guarantors.*—Mere indorsers upon a promissory note are not liable as guarantors.

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Assumpsit, on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

STATEMENT OF THE CASE.

This suit was brought upon a promissory note to recover \$100, and was tried by the court without a jury.

The declaration charges defendants Hartman and Berger as gurantors.

The defendants filed a plea of general issue.

The plaintiff was the only witness examined, and he testified to his ownership of the note, the time he purchased it, and that before it was due he purchased it from one Hardy, not a party to the instrument, and paid \$100 therefor; the remainder of plaintiff's case is established by the note and the presumptions indulged by law.

The defendants offered no evidence except the files, showing confession of judgment by the makers, which was admitted by plaintiff.

The note and indorsements were as follows, and in the order mentioned:

“\$100. CHICAGO, ILL., Feb. 6, 1894.

One year after date, for value received, I promise to pay to the order of myself one hundred dollars, at the office of J. A. Hartman, Chicago, Ill., with interest at six per cent per annum after date until paid. And to secure the payment of said amount I hereby authorize irrevocably any attorney of any court of record to appear for me in such court, in term time or vacation, at any time hereafter, and confess judgment, without process, in favor of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs and twenty-five dollars attorney's fees, and to waive and release all errors which may intervene in such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that my said attorney may do by virtue hereof.

NELLIE MELLIGEN.”

Indorsed as follows:

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“Pay to the order of Mrs. E. A. Berger. H. C. Hartman,
Mrs. E. A. Berger, Nellie Melligen.”

J. A. COLEMAN and WILLIAMS, LINDEN, DEMPSEY & GOTTF,
attorneys for appellant.

No appearance for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE
COURT.

An instrument in form of a note, payable to the order of the maker, is not a note until indorsed, ordered paid by the maker, and delivered.

So far as appears, this instrument was not a contract of any kind until after the indorsements were made by Hartman and Mrs. Berger.

Appellees Hartman and Mrs. Berger were record indorsers only. Pike v. Hately, Ill. App., opinion filed February 11, 1896; Blanchford v. Milliken, 35 Ill. 434.

There was no evidence warranting a recovery against them as such.

The judgment of the Circuit Court is affirmed.

Margaretha Meyer v. Charles G. M. Meyer.

1. EVIDENCE—*Statements of Parties.*—The statements of an applicant for divorce to third persons, in explanation of appearances upon her person and clothing, which appeared to be the result of recent causes, is not competent evidence, corroborating her testimony as to what those causes were.

Divorce.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

HIRAM H. CODY & SONS and LEONARD GOODWIN, attorneys for appellant.

JOHN H. HILL, attorney for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

In this case we are asked to review and reverse the decision of the judge of the Circuit Court, made upon the testimony of a great many witnesses whom he saw and heard, and of the value of whose testimony he had therefore much better opportunity to form a correct judgment than we have. *Rackley v. Rackley*, 151 Ill. 332. And we find that the appellant in asking us to reverse that decision is very largely proceeding upon an erroneous theory, which is, that what the appellant herself said in explanation of appearances upon her person and clothing, which seemed to be the result of recent causes, was competent evidence corroborating her testimony as to what those causes were.

Since our decision to the contrary in *Elguth v. Grueska*, 57 Ill. App. 198, the decision by the Supreme Court in *Springfield Con. Ry. v. Welsch*, 155 Ill. 511, seems to trench upon the rule; but the declaration there was of no material consequence, because, whether the motorman could not stop the car because of some defect in machinery or his own incompetency, or because of his own negligence, the liability of the railway was the same.

And it makes no difference that evidence of what she said was admitted with or without objection to it. A decree is assumed to be based only upon the competent evidence in the record. *Treleaven v. Dixon*, 119 Ill. 548.

The appellant filed this bill for a divorce upon the charge of extreme and repeated cruelty by the appellee. The court, after a full hearing, dismissed the bill, and the decree is affirmed. Nobody would be the better for a recapitulation of the testimony. Affirmed.

C. A. Boos v. A. S. White.

1. IMPRISONMENT FOR DEBT—*Jury Trial—Waiver.*—No person can be imprisoned for the non-payment of a fine or judgment except upon the conviction of a jury, unless such trial by jury is waived by the execution of a formal waiver in writing (fines inflicted for contempt of court excepted).

2. SAME—*Construction of Statutes.*—Section 12, of article 18, chapter 79, R. S., entitled “Justices and Constables” (act of 1895), does not apply to arrests under the provisions of section 4 of article 11 of the same chapter. The execution issued under section 4 is because of something done subsequent to the judgment.

3. SAME—*Defendant Entitled to a Jury Trial upon Allegations of the Affidavit for a Capias.*—Where an affidavit is filed under section 4, article 11, chapter 79, R. S., entitled “Justices and Constables” (act of 1895), setting up matters accruing subsequent to the judgment for the issuing of an execution against the body, the defendant is entitled to a trial by jury upon such matters.

Proceedings Against Insolvent Debtors.—Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed April 27, 1896.

STATEMENT OF THE CASE.

Upon petition filed in the County Court under the insolvent debtors’ act, that court discharged the petitioner, he having been arrested on a ca. sa. issued upon a judgment rendered by a justice of the peace, which ca. sa. was issued by virtue of an affidavit, made in pursuance of section 4, article 11, of an act in relation to justices of the peace, Laws of 1895, page 214.

The County Court discharged the defendant in execution, for the reason that the judgment on which the execution was issued was rendered without the verdict of a jury, and without a waiver of jury, the County Court holding that in all cases, a verdict of a jury or a waiver thereof is necessary before a ca. sa. can issue. The contention of the appellant is that the provision of the statute, section 12, page 224, Laws of 1895, refers only to imprisonment for non-payment

of a fine or judgment when the ca. sa. is issued by virtue of the judgment alone, and has no application to those cases where a ca. sa. is issued, in pursuance of said section 4, by virtue of an affidavit charging a refusal to surrender goods on execution, or that debtor has fraudulently conveyed or concealed his goods. No other question was raised, and there is none other involved in this appeal.

LEMMA & COPE, attorneys for appellant.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Section 12 of article 18 (p. 224, Laws of 1895), Hurd's Statutes 1895, 973, is as follows:

"No person shall be imprisoned for non-payment of a fine or a judgment in any civil, criminal, quasi criminal, or *qui tam* action, except upon conviction by a jury; *provided*, that the defendant or defendants in any such action may waive a jury trial by executing a formal waiver, in writing, and when such waiver of jury is made, imprisonment may follow the judgment of the court without conviction by the jury. This section shall not apply to fines inflicted for contempt of court."

Section 4 of article 11 (p. 214 of Laws of 1895), Hurd's Statutes 1895, 966, is as follows:

"When the judgment creditor is not entitled to an execution against the body of the defendant, under the preceding section, if upon the return of an execution against the goods and chattels of the defendant unsatisfied in whole or in part, the judgment creditor, or his agent or attorney, shall file with the justice of the peace from whom the execution is issued, an affidavit, stating that demand has been made upon the debtor for the surrender of his money, goods and chattels for the satisfaction of such execution, and that he verily believes that such debtor has moneys, goods and chattels not exempt from execution, which he unjustly refuses to surrender, or that since the debt was contracted, or the cause of action accrued, the debtor has fraudulently conveyed,

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concealed, or otherwise disposed of some part of his moneys, goods and chattels, with a design to secure the same to his own use or defraud his creditors; and also setting forth, upon his knowledge, information or belief, in either case, the facts showing that such belief is well founded—such justice of the peace, if he shall be satisfied that the facts so set forth justify such belief, shall issue an execution against the body of the judgment debtor.”

Section 12 of article 18 does not apply to arrests under the provisions of section 4 of the statute concerning justices and constables. The execution under section 4 is because of something done subsequent to the judgment. Whether the allegations in the affidavit, upon which the execution is issued, are true, is a matter upon which the defendant is entitled to a hearing and a jury trial. The imprisonment can not be continued except under the verdict of a jury.

The judgment of the County Court is reversed and the cause remanded.

Matthias P. Streff et al. v. John Colteaux.

1. **SIGNATURE—*By Rubber Stamp.***—The court is not aware of any authority to the effect that one may not sign his name by an impression made with a rubber stamp. It is ordinarily the act of making a paper one's own that is important, rather than the manner of doing it.

2. **PLEADING—*Common Counts—When Sufficient.***—There is a plain distinction between actions on executory contracts and actions on contracts fully performed, so that nothing remains to be done but to pay money due thereon; in the latter case common counts are sufficient.

3. **APPELLATE COURT PRACTICE—*Matters to be Abstracted.***—Matters relied upon to reverse the judgment complained of must be abstracted.

Assumpsit, for commissions, etc.—Error to the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

D. J. HAYNES, attorney for plaintiffs in error.

WHEELER, AUSTIN & LENNARDS, attorneys for defendant in error; **COOK & MOFFETT**, of counsel.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

In this action the plaintiff below filed a declaration containing three special counts in assumpsit, the second of which is, substantially, the common *quantum meruit* count. To this declaration the defendant below filed a special demurrer, which was in his absence overruled.

Thereafter, also in the absence of the defendant below, a trial, verdict and judgment for the plaintiff were had.

It is said that the declaration was signed only by an impression thereon of the names of plaintiffs' attorneys, made by a rubber stamp.

We are not aware of any authority to the effect that one may not so sign his name. It is ordinarily the act of making a paper one's own that is important, rather than the manner of so doing. Am. & Eng. Ency. of Law, Vol. 27, p. 781.

The demurrer to the declaration was properly sustained and the judgment of the Circuit Court is affirmed.

MR. JUSTICE WATERMAN ON REHEARING.

In a petition for rehearing, counsel urge that it is error to permit a default to be taken on a pleading to which an interposed demurrer remains undisposed of. The abstract filed by the same counsel shows that on October 29, 1895, the demurrer to the plaintiff's declaration was overruled; this was to the amended declaration, to which Mathias P. Streff demurred, being the only declaration then in the case and on which default was entered November 7, 1895.

There is a plain distinction between actions on executory contracts and actions on contracts fully performed, so that nothing remains to be done but to pay the money due thereon. In the latter case the common counts are sufficient. Chitty on Pleadings, Vol. 1, p. 350-359; Tunison v. Field, 21 Ill. 108; Pickard v. Bates, 38 Ill. 40; Elder v. Hood 38 Ill. 533.

Counsel also urge that it was error to enter judgment against Gustavia Streff, she not being a party to the amended declaration. The abstract prepared by counsel

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fails to show the entry of a judgment against Gustavia Streff. Matters relied upon to reverse must be abstracted. *Kellogg v. McClelland*, 62 Ill. App. 636.

As appears from the record, there is no judgment against Gustavia Streff. The petition for a rehearing is denied.

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**James A. Sackley and Peter Peterson, copartners as
Sackley & Peterson, v. The Town of Cicero.**

1. CONTRACTS—*Construction of.*—This case involves the construction of a contract for the improvement of Washington boulevard, containing the terms "road-bed" and "lineal foot."

Assumpsit, for paving, etc. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the March term, 1896. Reversed, and judgment entered with a finding of facts, etc. Opinion filed April 27, 1896.

STATEMENT OF THE CASE.

The only question involved in this appeal is the construction of a contract made between the parties for the improvement of a portion of Washington boulevard.

The Town of Cicero, appellee, entered into a contract with the appellants for the improvement of Washington boulevard from the east line of Robinson avenue to the center line of Harlem avenue, in said town; the improvement to be made in accordance with the ordinance providing therefor.

It is admitted the work was done according to the provisions of the contract and ordinance. The road-bed, under the contract, was to be paid for by the lineal foot, and the only question is the number of lineal feet. This question arises from the fact that the ordinance requires that the roadway shall be extended north and south on all street and alley intersections to the north and south lines of Washington boulevard.

The appellee claims that the measurement of the lineal feet of road-bed should be confined to a straight line drawn along the center line of Washington boulevard from the east line of Robinson avenue to the center line of Harlem avenue, while appellants contend that the lineal feet of road-bed constructed on intersecting streets and alleys north of the north curb line and south of the south curb line of Washington boulevard should be added thereto, figured, however, on the basis of thirty-eight feet in width, being the width provided for in the ordinance for the road-bed on Washington boulevard.

It is agreed that if the road-bed constructed north and south of the curb lines of Washington boulevard are to be added, the amount of lineal feet, on the basis of thirty-eight feet in width, would amount to 744.18 lineal feet, which at \$2.95, the contract price, would amount to \$2,283.85 more than the judgment from which this appeal is taken.

The evidence shows that at these intersections, instead of the grading down north and south from center line of Washington boulevard to the curb line, the center line of these extensions is kept up to the same grade as the east and west center line of Washington boulevard, and the grading down is east and west to the curbs on the sides of these extensions.

The contract was to do the work as per the ordinance, and to be paid for as follows: Curbing 50c. per lineal foot; grading 8½c. per cubic yard.

"The sum of \$2.95, for making and completing the road-bed in place as per specification, per lineal foot."

Catch-basins built, \$25 each; catch-basins raised, \$10 each; man-holes raised, \$5 each; double cross-walks, 52c. per lineal foot; approaches, \$5 each.

The ordinance provides:

Section 1. That Washington boulevard, from the east line of Robinson avenue to the center line of Harlem avenue, be improved by grading, curbing and paving in manner following, to wit:

The road-bed shall be excavated for a width of thirty-

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eight feet, the same being nineteen feet on each side of the center line of said boulevard, to a depth below established grade of fifteen inches at the center line, and eighteen inches at the sides, and properly curved off between those points; * * * there shall be a curb laid on both sides of the roadway, the face of which shall be at a distance of nineteen feet from the center line thereof. * * * The curb shall be continued to the north and south lines of Washington boulevard at each street and alley intersection, the return at each alley intersection being formed of one circular stone of twenty inches radius.

On the road-bed, as before described, shall first be spread crushed limestone, to a depth of eleven inches at the center and seven inches at the side. * * * The roadway as last described shall extend to the north and south lines of Washington boulevard at all street and alley intersections.

The foregoing is all of the ordinance bearing on the question involved in this appeal.

R. S. THOMPSON, attorney for appellants.

HENRY R. PEBBLES, town attorney, for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

By the contract appellants were to be paid \$2.95 per lineal foot for making and completing the road-bed as per specifications.

The road-bed was to be excavated for a width of thirty-eight feet, and to be excavated and filled so that the center would be eleven inches higher than the sides.

The roadway was to extend to the north and south lines of the boulevard at all street and alley intersections.

While there is room for contention that the words "road-bed" and "roadway" were used in the contract synonymously, it is to be noted that appellants were to be paid per lineal foot of "road-bed;" and that doing the work to the satisfaction of appellee, they did not at the intersections at

the distance of nineteen feet from the center, leave the sides eleven inches lower than the center, but treated the intersections as cross-beds, their centers being excavated and filled so as to be on a level with that of the main east and west road, while the sides of the intersections were left eleven inches lower than the centers. This method of construction was evidently desired by appellee. Such construction was impossible if the directions as to the excavation and filling were complied with and the intersections were regarded as a part of the east and west road-bed.

The contract contemplated a road-bed running east and west along the boulevard, and road-beds at the intersections running respectively north and south from the several north and south lines of the boulevard to lines nineteen feet from the center of the east and west road-way; and for the total lineal feet of such road-beds appellants are entitled to be paid.

The judgment of the Circuit Court is reversed. A judgment will be entered here on a finding of facts.

Reversed, and judgment here with finding of facts.

MR. JUSTICE SHEPARD dissents.

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Winkle Terra Cotta Company v. The Galena Safety Vault and Trust Company et al.

1. **MECHANICS' LIENS—Time of Performance.**—A petition for a mechanic's lien, which alleges that one of two defendants undertook to erect a building for the other and contracted with the petitioner for work and materials to be paid for upon the presentation of architect's certificates, sufficiently fixes the time for the performance of the contract.

2. **SAME—Original and Modified Contracts.**—The parties to a contract may modify it, and if as modified it would have been valid originally, and the performance of it a basis for a lien, the fact that performance was not according to the terms of the original, but of the modified contract, does not defeat the lien.

Winkle Terra Cotta Co. v. Galena Trust Co.

Petition for a Lien.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

EDWIN WHITE MOORE, attorney for appellant.

NEWMAN, NORTHRUP & LEVINSON, attorneys for appellees.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant filed this petition against the Vault company and Michael Greenebaum's Sons Company to enforce a mechanic's lien upon the premises of the Vault company. The petition was dismissed upon separate demurrers of the Sons company and the Vault company.

The petition alleges that the Sons company undertook to erect a building for the Vault company, and contracted with the appellant for work and materials to be paid for "upon the presentation" of architect's certificates—fixing no time. The appellees rely upon *Adler v. World's Pastime Ex. Co.*, 126 Ill. 373, as holding that the time of payment not being fixed by the contract, no lien could accrue. Without attempting to distinguish this case from that, it appears that the court there first held that the contract itself was for a kind of service which, in part, could not create a lien, and that as a lien must be for all or none, there could be no lien for the other part.

The question here involved was apparently very slightly considered, and the authorities there cited are a part of those giving rise to the "painful uncertainty" of which mention is made in *Porteous v. Holmes*, 33 Ill. App. 312, affirmed as to the lumber dealer there alluded to, though without comment upon the principles of the opinion here, in *Porteous v. Badenoch*, 132 Ill. 377.

We adhere to these principles, and deem it unnecessary to repeat them. *Benner v. Schmidt*, 44 Ill. App. 304.

The next objection is, that the petition does not show that any architect's certificates were presented.

The petition alleges a settlement with the Sons company,

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and its promise to pay the balance unpaid. The Vault company was no party to the contract. Those who made could modify it, and waive any part of its provisions.

If, as modified, the contract would have been valid originally, and performance of it a basis for a lien, the fact that performance was not according to the terms of the original, but of the modified contract, does not defeat the lien.

That is the principle of *Nibbe v. Brauhn*, 24 Ill. 268; of *Baxter v. Huchings*, 49 Ill. 116; of *Paddock v. Stout*, 121 Ill. 571; of *Michaelis v. Wolf*, 136 Ill. 68; and of common sense. *Benner v. Schmidt*, 44 Ill. App. 304.

The petition alleges that on a day named "the said subcontract of your petitioner was fully completed by the final delivery of all of the materials required thereby, and the construction and finishing of the terra cotta and the setting of the same; and said contract, and all of the specifications and requirements thereof, were on said day fully and exactly performed by your petitioner."

In citing *Short v. Kieffer*, 142 Ill. 258, as authority that such allegation of performance is insufficient, the appellee's counsel forgot that the bearings of an opinion lie in the application of it.

When performance is a question of fact for a jury, the general allegation is the most proper; when a question of law for the court, the manner of performance must be stated. *Byrne v. McNulty*, 2 Gilm. 424, cited in *Chi., Mil. & St. P. Ry. v. Hoyt*, 44 Ill. App. 48.

The residue of the appellee's brief is answered by what is already said, except an objection that the appellant did not serve, with its notice to the Vault company, a copy of its final contract with the Sons company.

As whatever modifications there were, were oral, no copy could be served. Sec. 31, Ch. 82, 1874.

The petition is sufficient, if true, and the appellant must be allowed to try to prove it.

The decree is reversed and the cause remanded, with directions to overrule the demurrers.

Reversed and remanded with directions.

Michael Myers v. American Steel Barge Company.

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1. **VARIANCE—Instructions to Find for the Defendant.**—When a variance is pointed out on the trial between the declaration and the plaintiff's proofs, if the plaintiff prefers to stand by his declaration, instead of amending the same, it is proper to instruct the jury to find for the defendant.

2. **MASTER AND SERVANT—Accidents—Presumptions of Negligence.**—If the breaking of machinery or tools is because of defects therein, to charge the master with negligence, it must be shown that he either knew or ought to have known of the weakness which caused the accident.

Trespass on the Case, for personal injuries.—Appeal from the Superior Court of Cook County; the Hon. PHILLIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

STATEMENT OF THE CASE.

In this case the court below, at the close of plaintiff's evidence, on motion of defendant, directed a verdict for defendant, which was duly rendered.

The action was trespass on the case for personal injuries.

On the occasion in question the plaintiff had been employed, with seven other men, by defendant, to trim its vessel, Colgate Hoyt, which was being loaded with corn at the Illinois Central elevator, in the city of Chicago. The spouts through which the grain ran into the vessel were secured by hinges to the elevator, and the outer ends were supported over the open hatchways of the vessel by a wire cable stretched from stem to stern of the vessel, and supported about seven or eight feet above the deck by 2x4 lumber, crossed, the spouts being so heavy that it took a strong man to lift an end of one. The evidence showed that this cable and its appliances were kept on board the vessel, and put up from time to time as needed. On the morning in question the plaintiff, with the "gang" to which he belonged, came about 8 o'clock to trim the grain, and found that the cable was not in position, and so the gang waited about the dock until about 10 A. M., when the cable was put in position and the grain commenced to run. Four of

the spouts were in place and a fifth was being hoisted by a portion of the gang of trimmers. At that moment plaintiff and one of his comrades was in the act of placing a board at one of the coamings of a hatchway, to prevent the grain from shooting over, when a hook or buckle gave way, and the cable, weighted with the spouts, came down upon the back of plaintiff, pinning him face downward on to the deck.

No other evidence tending to show negligence was shown.

The only evidence as to the reason for the breaking or coming down of the cable was the testimony of Captain Keith, the general agent of the defendant. The Captain stated that he had made an investigation to see what was the cause of the coming down of the cable, and found that it was because of the breaking of the turn-buckle, which was an article with a right and left screw on each end for tightening the cable. Turning the screw took up the cable; the slack of the cable. He stated that he examined what he was told was the broken part; that so far as he could see the material was perfect; that it was of wrought iron, or steel, about an inch in diameter, and the screw that went into that would be about the same size.

He was asked: "Q. How long had that appliance been in use, Captain?" And he answered: "Oh, it could not have been in use more than two or three years, because that was the age of the boat. It was kept on board of the boat to erect as occasion required.

Michael Haggerty, another witness who was present and saw the accident, testified that it was the hook to which the cable was fastened at the forward end of the boat that gave way.

E. A. SHERBURNE, attorney for appellant.

WALKER & EDDY and FEY & HYDE, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

In this case each count of the declaration charged spe-

Myers v. American Steel Barge Co.

cifically that the accident was caused by the breaking of a cable.

No evidence that a cable broke was given; on the contrary, the evidence was that a buckle or hook broke, and therefrom the plaintiff was injured.

Upon the motion that the jury be instructed to find a verdict for the defendant, this variance was pointed out, yet the plaintiff preferred to stand by his declaration, instead of amending the same, as he might have done.

Because of such variance the jury were properly instructed to find for the defendant. *Wabash Ry. Co. v. Friedman*, 146 Ill. 583-589.

The writer of this is of the opinion that while it is the duty of an employer to exercise reasonable care to see that the tools and appliances provided for the use of his workmen are reasonably safe, and employes have a right to presume that this duty has been discharged, the mere fact that an employe, while engaged in the work he has been set to do, is injured by the giving way of machinery, appliances or tools provided by his employer, does not of itself prove that the injury was the result of negligence upon the part of the master.

In other words, a presumption of negligence does not arise from such proof, nor does it, as is contended, establish a *prima facie* case of negligence.

If the breaking of the machinery or tools was because of a defect therein, to charge the master with negligence it must be shown that he either knew, or ought to have known, of the weakness which caused the accident. *C., C. & I. C. Ry. Co. v. Troesch*, 68 Ill. 545; *Chicago & Alton Ry. Co. v. Platt*, 89 Ill. 141; *East St. L. P. P. Co. v. Hightower*, 92 Ill. 139; *Duffy v. Upton*, 113 Mass. 544; *Sack v. Dolese*, 35 Ill. App. 636; *Same v. Same*, 137 Ill. 136; *Joliet Steel Co. v. Shields*, 146 Ill. 607.

The plaintiff called as a witness the agent of the defendant, who testified that having examined a buckle, the breaking of which he was told caused the injury, the material thereof seemed perfect.

Appellant urges that whatever broke was not a thing with which he had anything to do, and that therefore the breaking of it from, as he says, its weakness, creates a presumption of negligence.

The buckle and hook were necessary adjuncts to the work which appellant was employed to do; he was indeed not bound to examine either, but if injured, as a result of the insufficiency of either, he is bound in an action against his employer to show that his master either knew, or ought to have known, of the fault; in other words, that the master was negligent, which is not presumed.

The judgment of the Superior Court is affirmed.

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168s 384

William C. McClintock v. George H. Helberg.

1. **TRIALS—By the Court—Its Conclusions.**—Where the court below sees and hears the witnesses, its conclusion must be accepted as right.

Bill in Chancery.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

JAMES L. CLARK, attorney for appellant.

W. S. COY and GEO. L. THATCHER, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The original transactions which led to the present controversy are detailed in *Helberg v. Nichol*, 149 Ill. 249.

It now appears, in addition to what is there shown, that when the bill was first filed an injunction was awarded, the terms of which do not appear in the abstract, which being dissolved when the bill was dismissed, a bond was delivered to the solicitor of the appellee of the tenor following:

“Know all men by these presents, that we, Isaac A. Hart-

McClintock v. Helberg.

man and Valentine G. Hunt, of the city of Chicago, county of Cook, and State of Illinois, are held and firmly bound unto George H. Helberg of said Chicago, in the penal sum of (\$4,500) four thousand five hundred dollars, for the payment of which, well and truly to be made, we jointly, severally and firmly bind ourselves, our heirs, executors and administrators by these presents, as witness our hands and seals this 24th day of February, 1892.

The condition of the above obligation is such that, whereas, heretofore, and on the 6th day of December, 1890, the said George H. Helberg exhibited his bill in chancery in the Superior Court of said county, against the above named Isaac A. Hartman and others, in case No. 30,498, and obtained an injunction therein restraining the said defendant from collecting, paying or in any manner interfering with a certain promissory note and trust deed, in said bill set forth and described, which injunction is about to be dissolved by said court.

Now, therefore, if the prayer of said bill shall, upon final decree therein, be denied, and the said bill dismissed by the court, then this obligation to be void, but if said prayer shall to any extent be granted, and that in said final decree the court shall decide that the said Helberg is entitled to the relief there sought, then and in that case the said Helberg shall be entitled under this obligation to be paid not only the amount of said note, but also the further sum of seven hundred and fifty dollars (\$750).

ISAAC A. HARTMAN. [SEAL.]

VALENTINE G. HUNT. [SEAL.]

The appellant having paid the note of \$3,690 to Hartman, the question now is whether the appellant shall again pay it, as well as the other \$750 to the appellee. There is nothing to indicate that anybody but Hartman ever had any title to the note, though it does appear that in the name of Hartman's wife the appellant was sued upon it.

Whether the decree in favor of the appellee is such as will be of any avail to him as to the note and trust deed securing it, will not be considered.

Why—upon what terms—the bond was given and accepted, is the subject of irreconcilable testimony given on the hearing. The appellant's position is that it was not only to prevent an application under Sec. 21, Ch. 69, "Injunctions," for a continuance of the injunction, but as a release of all claim upon the note and trust deed, while the appellee assents only to the first branch of that position.

The court below saw and heard the witnesses, and we accept its conclusion that the appellee is right.

Under the decision of the Supreme Court, the appellee at the time this bill was filed, was entitled to all the purchase money unpaid by the appellant.

The appellant and Hartman could not by any dealings between themselves, while the suit of the appellee against them was being prosecuted, limit the relief to which the appellee might be entitled. If the appellant had not paid Hartman *pendente lite* he would now—unless used otherwise—have the money with which to pay appellee.

It appears that the solicitor of the appellee consented to a release of part of the premises described in the trust deed. That consent seems to have been gratuitous, and without the sanction of the appellee. There is no error in the decree of which the appellant can complain, and it is affirmed.

Nicholas J. Becker and Peter H. Becker v. Henry A. Foster, Adm'r.

1. **WITNESS—Competency of Waived.**—A party may waive the question as to the competency of a witness to testify against him by putting such witness upon the stand as his own witness, or by making no objection when he is called as a witness by the adverse party.

2. **APPELLATE COURT PRACTICE—Assignment of Errors.**—An error not assigned can not be considered by the Appellate Court.

Trespass on the Case.—Death from negligent act. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

ALNOLD TRIPP, attorney for appellants.

Becker v. Foster.

J. WARREN PEASE, attorney for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action by the appellee for damages for the death of Adam Mueller, of whom the appellee is administrator, caused, as is alleged, by the negligence of the appellants.

The action was commenced against Jacob Becker, father of the appellants, and after more than two years had passed since the injury to the deceased, these appellants were brought into the case as defendants by amendment. They pleaded the statute of limitations, to which the appellee replied fraudulent concealment of the cause of action, but we find it unnecessary to comment upon that part of the case. It is not assigned as error that the replication is insufficient to support the judgment, and we will not discuss whether the replication is proved.

The appellee called the appellant Nicholas as a witness, and he testified. When the appellants were putting in their defense, they put him upon the stand as a witness and he testified, without objection by the appellee, to his competency. But to several questions to him, material to the defense, the appellee objected, and the objections being sustained, the appellants excepted. The brief of the appellants, and the assignment of errors, question the act of the court in sustaining such objections, and the only justification offered by the appellee is that Nicholas was not a competent witness, as the suit was against him by an administrator, citing Sec. 2, Ch. 51, R. S., "Evidence."

The general question of his competency does not arise on this record. The appellee waived it by putting him on as a witness for the appellee, as well as by making no objection when he was called as a witness for the appellants. 1 Greenl. Ev., Sec. 421; 2 Ph. Ev., Cowen & Hill's Ed., 872; Hippel v. De Puie, 51 Ill. 528; Doty v. Doty, 159 Ill. 46.

For the error in sustaining such objections the judgment is reversed and cause remanded.

John S. Ford et al. v. Charles B. Kelley.

1. **ASSIGNMENT FOR THE BENEFIT OF CREDITORS—*Prior Judgment Creditors*.**—Where the real estate of an insolvent assignor is sold by the County Court subject to all valid and prior liens, the proceeds of such sale can not be applied exclusively to the payment of a judgment obtained prior to the assignment. The money received from such sale goes into the general fund of assets, out of which the judgment creditors are entitled to dividends upon the amount of their judgment.

Voluntary Assignment.—Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

PADEN & GRIDLEY, attorneys for appellant.

The assignee under an assignment for the benefit of creditors, takes no better title than his assignor possessed. His title will be affected with every infirmity and be subject to all the equities that existed in respect thereof, in the hands of the assignor. *Davis et al. v. Chicago Dock Co.*, 129 Ill. 180; *Jack v. Weiennett*, 115 Ill. 111; *Union Trust v. Trumbull*, 137 Ill. 179; *Kiehn V. Bestor*, 30 Ill. App. 467.

A creditor of an insolvent debtor who has made a voluntary assignment for the benefit of creditors by proving his debt against the estate, will not waive or lose his lien on the assigned property. *Yates v. Dodge*, 123 Ill. 50.

The County Court has complete jurisdiction in assignments, with equity power to relieve against void assignments and determine rights of prior lienors. *Wilson v. Aaron*, 132 Ill. 238; *Freydendall v. Baldwin*, 103 Ill. 325; *Hanchett v. Waterbury*, 115 Ill. 220; *Farwell v. Crandall*, 120 Ill. 70; *Messinger v. Yager*, 16 Ill. App. 260.

In equity the proceeds from the sale of real property upon which there is a lien will be treated as the real estate itself. *Gaty v. Casey*, 15 Ill. 189; *Paddock v. Stout*, 121 Ill. 57.

EDWARD S. ELLIOTT, attorney for appellee; **ALDRICH, REED, BROWN & ALLEN**, of counsel.

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The assignee took the property subject to all liens; the assignor could convey only the equity of redemption. This is all he took, and consequently was all he could sell. *Burrill on Assignments*, Sec. 349 *et seq.*; *O'Hara v. Jones*, 46 Ill. 288; *Davis v. Chicago Dock Co.*, 129 Ill. 181; *Yates v. Dodge*, 123 Ill. 50; *In the Matter of Bates, Assignee*, 118 Ill. 524.

The extent of appellants' right respecting the fund in assignee's hands is a right to their *pro rata* share in its distribution, based on the whole amount of their claim as proved and filed with the assignee. *Burrill on Assignments*, Sec. 393, and cases there cited; *In the Matter of Bates*, 118 Ill. 524; *Yates v. Dodge*, 123 Ill. 50; *Keim's Appeal*, 27 Penn. St. 42; *Graeff's Appeal*, 79 Penn. St. 146; *Paddock v. Bates*, 19 Ill. App. 470; *In re Assignment of Hobson*, 81 Ia. 393.

A court of equity will not always treat the fund realized from a sale of real estate as it would treat the property itself, and in the present case the statute relating to voluntary assignments peremptorily excludes the application of any such doctrine. *S. & C. R. S.*, ch. 72, par. 49; *In the Matter of Bates*, 118 Ill. 529.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee is assignee in insolvency of the Imperial Hotel Company, administering the assets of the company under the direction of the County Court.

April 30, 1894, the court ordered the appellee to offer the real estate of the company for sale, "subject to all valid and prior liens whatever." He sold it for \$5,000, and the appellants petitioned that the appellee be directed to pay out of that money a judgment they had obtained against the company before the assignment. The court denied the petition, and appellants appealed to this court.

The court could order the assignee to sell only what the insolvent could have sold, and had no more authority to displace liens than the insolvent would have had, and the court

made no attempt to displace liens. In legal effect, the sale was only of residuary interest of the insolvent. There was no conversion of the whole estate into money by a sale under paramount authority, or by insurance paid upon a loss by fire, as in cases cited by appellants. The money received from the sale goes into the general fund of assets, out of which appellants are entitled to dividends upon the amount of their judgment. To what extent they may obtain any relief from the property sold, by process upon their judgment, or otherwise, is not now in question.

The order dismissing the petition is affirmed.

John Baring and Elizabeth Baring v. Edward Bohn and William Bohn, Adm'rs.

1. **CONVEYANCES—*Covenants as to Incumbrances.***—Where a person gives a statutory deed of warranty containing an exception as to incumbrances to certain amount, which are assumed by the grantee, the grantor is bound to pay any incumbrance then on the premises in excess of the sum named.

Transcript from a Justice of the Peace.—Appeal from the County Court of Cook County; the Hon. OREIN N. CARTER, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

STATEMENT OF THE CASE.

This action was commenced in a justice court, by Fritz Bohn and Edward Bohn, against these appellants, and judgment was rendered in favor of the plaintiffs for \$157.50 and costs.

Before the trial in the County Court the death of Fritz Bohn was suggested, and on plaintiff's motion the cause was ordered to proceed in the name of William Bohn, as administrator of Fritz and Edward Bohn. The action is based on an exchange of property, subject to an incumbrance of \$7,000. Suit was brought under a warranty deed,

Baring v. Bohn.

to recover \$150 for interest earned on said incumbrance at the date of the deed.

The warranty deed is in the usual form, and is from appellants to Fritz and Edward Bohn, "subject to incumbrances in the sum of \$7,000, on all of said lots, which is assumed by the grantees."

Judgment was rendered for the plaintiffs for \$148.16 and costs, from which judgment the appeal in this case is prosecuted.

HENRY J. GERPHEIDE, attorney for appellants.

NEWCOMER & DELLENBACK, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellants having given a statutory deed of warranty containing the exception, "Subject to incumbrances in the sum of \$7,000 on all of said lots, which is assumed by the grantees," became bound to pay any incumbrance then on the premises in excess of said sum. There is no uncertainty in the deed, and its meaning is too clear for discussion.

It, for the purposes of the trial below, was immaterial from what source appellants derived their title, or whether they had any.

Having warranted that they had, they can not dispute the truth of such covenant.

The existence and payment by William Bohn of interest already earned on the \$7,000 incumbrance excepted from the warranty were shown; whether such interest was due when the warranty deed was executed is immaterial; it was earned, and appellees had to pay it to reduce the incumbrance to \$7,000.

Many purely technical objections to this judgment are made, none of which appear to be well taken. Without entering upon a discussion of them, it is a sufficient answer to the technical errors assigned to say that the abstract of the record does not show that any motion for a new trial was made.

The judgment of the County Court is affirmed.

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100s 152

James M. Keller et al. v. William Bading.

1. **INTERPLEADER—Eminent Domain Proceedings—Costs.**—Where the money for lands taken by proceedings, under the eminent domain act have been paid into the county treasury, and is claimed by different parties, the treasurer may file a bill of interpleader, and his costs will come out of the fund.

2. **Costs—As to Nominal Parties.**—Where a party to a chancery proceeding, who has no interest in the subject-matter of the controversy, desires to avoid costs, he should disclaim. If he denies by demurrer the authority of the court to act, costs may be properly adjudged against him.

Bill of Interpleader.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

CRUIKSHANK & ATWOOD, attorneys for appellants.

ERNEST SAUNDERS, attorney for appellee.

The awarding of costs is discretionary with a court of chancery. *Frisby v. Ballance*, 4 Scam. 287; *McArtee v. Engart*, 13 Ill. 243; *Carpenter v. Davis*, 72 Ill. 14; *Field v. Oppenstern*, 96 Ill. 580; *Schultze v. Houfes*, 96 Ill. 335; *Field v. Oppenstern*, 98 Ill. 68; *Askew v. Springer*, 111 Ill. 667; *Converse v. Rankin*, 115 Ill. 402.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Very shortly stated, this case is: Bading and wife, as tenants in common (*Cooper v. Cooper*, 76 Ill. 57), owned a lot from which part had been taken in proceedings under the eminent domain act, and the money for it was in the hands of the county treasurer. There was a mortgage upon the lot executed by the husband and wife, and a judgment later in the Circuit Court against the husband, in favor of the appellants.

The husband and wife filed this bill to have the court decide who should have the money, and the appellants

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demurred. Their demurrer being overruled, and they electing to stand by it, the court awarded the money, by consent of the husband and wife, to the mortgagee, who had asked for it by answer only, filing no cross-bill.

The mortgagee was entitled to the money. Colehour v. State Savings Inst., 90 Ill. 152. The appellants do not question that, but they say that they "do not know how to designate this bill." Had it been filed by the county treasurer, it would have been a bill of interpleader, and his costs would have come out of the fund. But Bading and his wife were concerned to have the money properly appropriated, thereby stopping interest. Had the appellants disclaimed, doubtless the court would not have adjudged costs against them; but denying, by demurrer, the authority of the court to act, the costs were properly adjudged against them. Converse v. Rankin, 115 Ill. 398.

Whether the mortgagee filed a cross-bill or not does not concern the appellants, nor do they complain of the manner of proceeding, if the bill was properly filed, except as to costs.

The decree is affirmed.

64	199
68	420
166	398

James M. Schultz and Alexander J. Schultz v. James Babcock, Thomas D. Hobson and Irving Mutchler.

1. **VERDICTS—Conclusive Upon Questions of Fact.**—Where the matters at issue involve only questions of fact, a verdict upon conflicting evidence must be regarded as final and conclusive.

Assumpsit, for money paid. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

LEVI SPRAGUE, attorney for appellants.

MELVILLE, STOBBS & MELVILLE, attorneys for appellees.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellees sued the appellants in assumpsit for a balance of money paid out by them at the request of appellants, for freight upon certain lumber used in the construction of a World's Fair hotel at Harvey, in this county, in the spring of 1893, and recovered a judgment for \$1,361.25.

The partnership firm, composed of appellees, had a contract with the hotel company to erect for it a hotel building for the sum of \$87,552.00, and made an arrangement with one J. C. Ahrens to furnish them with the lumber required for the job.

The arrangement made with Ahrens was an oral one, but it was fairly established that Ahrens was to deliver the lumber free on board of cars ("F. O. B.") at Harvey, and that the hotel company should in some way become responsible to Ahrens for the lumber.

Whatever the agreement with Ahrens in the latter regard may at first have been, the hotel company did, by a formal resolution adopted by its board of directors eighteen days after the date of its contract with appellees, and before Ahrens had furnished any lumber, "assume the lumber bill of J. C. Ahrens for lumber furnished by him to Babcock & Co., in the building, * * * to be paid for according to terms of our own contract with Babcock & Co., subject to all of the conditions of said contract, and also subject to the order of said Babcock & Co."

Ahrens was, however, unable to perform what he had undertaken. To quote his own language, he "was not able to swing" so large and undertaking, and he turned it over to the appellants, and on the back of the copy of the resolution of the hotel company from which we have quoted, he assigned his "interest to the within agreement to Schultz Bros." which assignment was duly approved by the hotel company.

Then it was that the appellants began to deliver lumber amounting in the aggregate to \$26,044.

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For such lumber the appellees never paid anything directly, but gave to appellants orders on the hotel company in pursuance of its said agreement to assume payment of the lumber bills. Such orders, however, were not paid by the hotel company, and appellants refusing to deliver any more lumber without payment, a meeting of all concerned was held on March 19, 1893, at which time a supplemental contract was entered into between the appellees and the hotel company, whereby the times of payment originally agreed upon were extended, and thereupon new orders on the hotel company were given to appellants by the appellees, payable at times in the future, in accordance with the terms of the new agreement.

Such orders, except to the amount of the first maturing one for \$3,000, were never paid. Later on, the hotel company gave to appellants its promissory notes, indorsed by some or all of its stockholders, for the amount due them which notes were taken either as collateral security to, or as payment of, the indebtedness, but have never been paid.

At the same time that the hotel company gave its indorsed notes to the appellants, the appellants surrendered to the hotel company the orders which they had received from the appellees.

Whether, as matter of law, the taking by appellants of the security of indorsed notes and surrendering the orders drawn by appellees did not operate to release the appellees from all further liability to the appellants, need not be discussed, although it probably did so operate.

But taking those circumstances into consideration, in connection with the testimony on the part of appellees that it was then expressly agreed by appellants that appellees' liability was at an end, and we have ample evidence to find, with the jury, that as a matter of fact the appellees were by agreement released.

That conclusion does not, however, dispose of the freight charges, which it is not claimed that the hotel company assumed or were in any way chargeable with.

Up to the time of the meeting on March 19th, it had been a

matter of considerable controversy as to who should pay the freight charges in the first instance. The appellees insisted then, as they do now, that although they were bound to deliver the lumber free from freight, yet by the custom of the trade the appellees should pay it and deduct the amount from the purchase price of the lumber, and in that way give appellants the benefit of a payment to that extent upon the lumber they sold. But however that may be, there was testimony that tended to show that at the meeting of March 19th, the appellants expressly agreed to pay to appellees all freight already advanced by them as soon as a statement thereof should be furnished, and all that might thereafter be paid by them upon bills therefor being rendered.

Acting upon that assumption, the appellees, on the next day, March 20th, rendered to appellants a statement, and received in reply the following letter:

“3|21, 1893.

Babcock, Hobson & Mutchler, Harvey.

GENTLEMEN: Your statement of freight paid, at hand, and is O. K. as to am't. Won't it be possible for you to let this run until the first of the month? We are close pressed just at present, and if you could let this run it will greatly accommodate us; or, if you can't let all of it stand, say a part of it. We send you herewith bills for cars held back. If there is anything particular you want rushed, let us know, and we will go for it.

Yours,

SCHULTZ BROTHERS.”

It was also proved that appellants did, about a week after the date of this letter, pay \$600 on account of the statement rendered. They never paid any more, and the suit was to recover for the balance on the statement of March 20th, and for freight subsequently paid by the appellees.

These matters were all questions of fact, upon which the evidence was conflicting in most respects, and we must regard the verdict of the jury as final and conclusive upon them.

The objection that the testimony of one of appellee's wit-

The People v. Gilbert.

nesses of the contents of the writing of March 19th was erroneously admitted, does not possess much merit. He was testifying to matters of oral agreement between appellees and appellants and the hotel company, concerning some things which, it is true, were involved in the writing between appellees and the hotel company entered into the same day, but which the appellants were not parties to, and we do not understand, from a reading of his testimony, that he can fairly be said to have testified as to the contents of the writing; not so, at least, to any material extent.

Complaint is made of the refusal of an instruction asked by the appellant, to the effect that the resolution of the board of directors of the hotel company, with reference to assuming the lumber bills, was only a guaranty of payment. We do not so construe that resolution, and think the instruction was properly refused. We think the only reasonable construction to be given to that resolution would charge the hotel company as primarily liable for the lumber, and all parties, by their conduct, seem to have so treated it.

As to the criticism of the other instructions, either given or refused, we will only say that we discover no material error in them.

The questions at issue were mostly ones of fact, and we regard them as settled by the verdict.

The judgment will accordingly be affirmed.

People of the State of Illinois, for the Use of the Wilkin-
son Company, v. James H. Gilbert, Elbridge G. Keith,
Dilwyn V. Purington, Harlow N. Higin-
botham and Charles L. Hutchinson.

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1. **LEASES—Covenants and Conditions.**—The breach of the condition of a lease is essentially different in its results from a breach of a covenant. In the case of a condition broken, the right of entry by the landlord, if the condition is of such a nature, will ensue, but for a breach of

covenant where no right of entry for such breach is reserved, only an action for damages will follow.

2. *RENT—Liability of the Sheriff for Occupancy of the Premises after Levy.*—Where a sheriff levied upon the goods of a tenant and occupied the leased premises for the purposes of selling the same under the execution, there is no liability on his part to the lessor for the rent of such premises during the period of such occupation, unless the lease is shown to have been thereby terminated, and the sheriff continuing in the occupancy of the premises became liable for the reasonable value of their use.

Debt, on an official bond. Error to the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

WALKER, JUDD & HAWLEY, attorneys for plaintiff in error.

CRATTY BROS., GRAY, MACLAREN, JARVIS & CLEVELAND, attorneys for defendant in error.

A lease at common law could only be terminated or forfeited for breach of any of its covenants, by re-entry. Taylor's Landlord and Tenant, 7th Ed., Sec. 291; 12 Am. & Eng. Enc. of Law, pp. 758 k, and 759 l, and notes 7 and 2; Wood's Landlord and Tenant, Vol. 2, Sec. 510; Chadwick v. Parker, 44 Ill. 327.

Some act on the part of the lessor showing an intention to declare a forfeiture for breach of covenant is necessary to terminate the lease for such breach. Raybourn v. Ramsdell, 78 Ill. 622; Cheney v. Bonnell, 58 Ill. 268; 12 Am. & Eng. Enc. of Law, 758 m, and note 8.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action of debt on the official bond of the sheriff of Cook county, James H. Gilbert, to recover for use and occupation by the sheriff of certain premises owned by the Wilkinson Company.

The defendant demurred generally to the declaration, and the demurrer being sustained, the plaintiff elected to stand by the declaration, and judgment was given for the defendant.

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As stated in appellant's brief, the declaration after reciting the election of Gilbert, as sheriff, and the giving and approval of his official bond with the remaining defendants as sureties, alleged "that the Wilkinson Company, on April 21, 1893, leased to J. S. Mossler & Brother the premises known as the store and basement of 269 State street in Chicago, at a monthly rental of \$500; that said lease contained a stipulation that said Mossler & Brother should not assign said lease, or sub-let the same without the written consent of the lessor, and would not permit any transfer by operation of law of the interest in said premises acquired through said lease; that it was further provided in and by said lease that the premises thus leased were to be occupied for a clothing, gent's furnishing goods, and kindred business, and for no other purpose whatever; that said Gilbert, as sheriff, received sundry writs and executions against said J. S. Mossler & Brother, under which he took possession of the business and property of said Mossler & Brother, at the above described premises, without the consent of the lessor, the Wilkinson Company, and prevented the said Mossler & Brother from further conducting their business in said premises, and occupied the same as such sheriff for the purpose of selling the property of said Mossler & Brother under said executions, from which he realized \$3,298; that it was necessary for said Gilbert to have some place to store and sell said goods, and that he remained in actual possession of said premises for such length of time that the rent thereof at \$500 per month would amount to \$410.84, which is a fair market rental value for said premises, and that he has charged said amount upon said executions, as part of the cost of executing the same; that the said Wilkinson Company has never received rent from any person for the time when said Gilbert occupied said premises, and that said Mossler & Brother never rented the said premises after the occupancy of said Gilbert, and never since said time paid the Wilkinson Company rent therefor; that said Gilbert refuses to pay said \$410.84, as rent for his occupancy of said premises to the damage of said Wilkinson Company."

The sole question is whether a cause of action is disclosed by the declaration.

The theory upon which the declaration proceeds seems to be that in some way by the act of the sheriff the lease to Mossler & Brother became terminated, and the sheriff continuing in occupancy of the premises, became liable for the reasonable value of their use.

The allegation that the lease contained a stipulation that Mossler should not assign the lease, or sub-let the premises, nor permit a transfer by operation of law, must be construed as the allegation of a covenant that Mossler would not do so, and not as a condition the breach of which would terminate the lease.

Nor is the allegation that the sheriff took possession of the business and property of Mossler at said premises and prevented Mossler from further conducting their business in the premises, and occupied the same as sheriff, for the purpose of selling the property of Mossler, an allegation of facts from which the legal inference follows that thereby the lease to Mossler terminated. Such allegations show, at most, an interference with Mossler's enjoyment of the premises, but not a disturbance of the landlord's rights.

For anything alleged, it does not follow that Mossler did not continue to occupy the premises, nor that during all the time the sheriff remained there in possession of the goods of Mossler, the lease was not in full force against Mossler, and that the premises did not remain, as before, the premises of Mossler.

The allegation that Mossler never rented the premises after the occupancy of the sheriff, and never since that time paid any rent therefor, is no sufficient allegation upon which to predicate a legal conclusion that their lease had been ended.

And unless the lease was terminated the sheriff was not responsible to the landlord for use and occupation, although he might be to Mossler.

The sheriff certainly was not liable to the landlord, unless by the fact of his entry into the premises some con-

The People v. Gilbert.

dition of the lease became broken whereby the term of Mossler came to an end. But there is no allegation that the lease contained any such condition, and there is no allegation that the statutory method of terminating the lease was resorted to, nor that in any way the lease was put an end to by the landlord.

It is argued that there was a voluntary surrender and letting into possession by Mossler to the sheriff, and an attornment by the sheriff to the landlord, and consequently the landlord's possession, as evidenced by the sheriff's charge for rent upon the executions as a part of the cost of executing the same, and that thereby the necessity of a re-entry by the landlord for condition broken was avoided.

But such argument begs the very question that the case presents.

There is no allegation of a voluntary surrender of possession to the sheriff; but, on the other hand, the strong inference from what is alleged concerning the possession that was taken by the sheriff is that it was done against the will of Mossler.

As before several times repeated, there is no allegation of a breach of any condition that was contained in the lease, nor was there even an allegation of any covenant for the breach of which a right of entry to the landlord ensued. The breach of a condition is essentially different in its results from a breach of a covenant. In the case of a condition broken the right of re-entry by the landlord, if the condition were of such a nature, would ensue, but for a breach of covenant, where no right of entry for such breach is reserved, only an action for damages would follow. *White v. Naerup*, 57 Ill. App. 114.

And as to the attornment by the sheriff to the landlord, there is no allegation that the sheriff ever acknowledged that the money charged by him upon the execution belonged to the landlord. The allegation upon which the argument of attornment is based is far short of what is necessary to amount to an attornment.

There may be a question between the sheriff and the

creditors, through Mossler, as to the expense charged by him for executing the writ, but there is none between him and the landlord.

The judgment of the Circuit Court must be affirmed.

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115 4229

William H. Rand and Andrew McNally v. B. Franklin Cronkrite, William E. W. Johnson and William W. Belvin.

1. **ESTOPPEL—*Changing Ground.***—The principle invoked by the rule that when a party gives a reason for his conduct and decision, touching anything involved in a controversy, he can not, after litigation has been begun, change his ground and put his conduct upon another and different consideration, applies only to defects in form, matters of detail, objections which a party could easily have, and it is to be presumed would have, removed had they been objected to, so that an after insistence upon them is an injustice, they not being of the substance of the contract.

2. **AGENCY—*Reasonable Time to Complete the Undertaking.***—Where an agency is not for a definite time, but the act to be done is one which requires time and labor for its completion, the agent is entitled to a reasonable time within which to complete his undertaking.

3. **SAME—*Termination of by the Principal.***—Where an agency has been created to endure for a definite period, it can not be terminated by the principal unless for the agent's default, or by virtue of some agreement to that effect, without a liability to the agent.

4. **SAME—*Breach of the Contract.***—If the principal unjustifiably terminates the agency, he is liable to the agent for the damages occasioned thereby, as in any other case of a breach of contract.

Assumpsit, for commissions. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed April 27, 1896.

STATEMENT OF THE CASE.

This suit was brought by appellees to recover from appellants the value of time as well as money, expended in and about the negotiation for the sale of the stock or business of Rand, McNally & Co. (a corporation of Chicago). There were three counts to the declaration, besides the common

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counts, but no claim of right to recovery was made under the second count.

The first count set up that in December, 1891, defendants employed plaintiffs to negotiate a sale or exchange of the entire stock of Rand, McNally & Co., to parties in England, between that time and May 1, 1892, and that the defendants agreed that if they should procure a purchaser before May 1, 1892, defendants would pay to plaintiffs \$85,700 in cash, and \$64,300 in stock of a company to be organized and to succeed to the business of said Rand, McNally & Co.; that under said agreement the plaintiffs sent W. W. Belvin to London, who entered upon the business of negotiating a sale; that the defendants, "while the plaintiffs were conducting said negotiations, and long prior to May 1, 1892, wrongfully and without any fault on the part of the plaintiffs or either of them, notified them that they would not sell said stock, and that plaintiffs should proceed no further in and about said business;" that by means thereof, the plaintiffs lost the time and services of Belvin for a long time, and expended a large sum of money in necessary expense in going to and returning from London, and maintaining Belvin while there, and in paying for telegrams, correspondence, services and assistance in connection with said business.

The third count sought to recover for the same thing, but set out more in detail the terms of the employment.

Appellees insist that the proof showed that in July, 1891, the appellees made an arrangement with the appellants to sell the stock or business of Rand, McNally & Co., and a contract for that purpose was made between Andrew McNally and William W. Belvin, for the reason that Belvin was expected to do the business in London, and a power of attorney was given by McNally to Belvin; that Rand & McNally, at that time, either had or controlled 9,200 shares of stock of Rand, McNally & Co., and were to obtain as many of the remaining 800 as they could procure. The written contract provided that Belvin should have a commission of \$85,700 in cash, and \$64,300 in preferred and

common stock of the corporation to be organized, and which should succeed to Rand, McNally & Co.

The power of attorney then given by McNally to Belvin recited that, "Whereas, Andrew McNally, of the city of Chicago, State of Illinois, owning or controlling 9,200 shares of the 10,000 shares, the entire capital stock of Rand, McNally & Co., of Chicago, Illinois, a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Illinois, is desirous of selling and conveying the entire capital stock of the said corporation, at and for the price of \$2,000,000 in cash in hand paid at the date of the delivery of the said stock, and for the further sum of \$1,500,000 in the paid up or non-assessable, fully issued capital stock of a corporation to be capitalized at \$4,500,000, in equal shares of stock, of the par value of \$100 each, which is to succeed the said Rand, McNally & Co.; and in case said capital stock of said new corporation is issued in part as preferred stock, and balance in common stock, the said stock payment of \$1,500,000 is to be made in the same proportionate amount of preferred stock and common stock as the entire amount of preferred and common stock are fully issued."

The power of attorney authorized Belvin to procure any European or other parties to purchase the stock at the rate of \$200 cash per share, and \$150 per share "of said capital stock, at the same time, in the paid up or non-assessable, fully issued capital stock of a corporation to succeed said Rand, McNally & Co., capitalized at \$4,500,000, in equal shares of stock of the par value of \$100 each," etc.

The contract and power of attorney were executed and dated on the 17th of July, 1891, and the appellants fully understood that Cronkrite and Johnson, who were in business as B. F. Cronkrite & Co., were to share with Belvin in the profits of the transaction.

Having made this arrangement, Cronkrite & Co. advanced to Belvin \$10,000 in money and Belvin proceeded immediately to London, with a view of negotiating a sale of the business and earning for himself and Cronkrite and Johnson the commission promised.

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At the time of receiving the contract and power of attorney Belvin was furnished with a very elaborate and descriptive statement of the assets and liabilities of Rand, McNally & Co., signed "Rand, McNally & Co., by Wm. H. Rand, president."

Mr. Belvin testified that at the time of making the July deal, the question whether this property had been ever before offered by any party in London was discussed, and that McNally told him that the property had never before been offered; that he was the first man they had ever discussed it with except Mr. Cronkrite, and that the property had never been offered in London.

Belvin, on his arrival in London, assiduously set to work to procure a contract for the sale of this large property, but on the 16th of October learned that the property had previously been on the market in London for sale for \$2,500,000 or \$1,000,000 less than he was authorized to sell the same for. Thereupon he took the first steamer home after telegraphing to Cronkrite. It appears that Cronkrite was absent when this telegram was received, and Mr. Johnson saw Charles Rand about it and then saw McNally. As a result of which a telegram was sent by appellees to Mr. Belvin as follows:

"McNally corresponded personally over a year ago with Gillig, basis, \$2,500,000, all cash, conditions entirely different. Now they have all stock promised. Gillig had no authority to sell. They have been offered more for some of their real estate than when placed with you, also are receiving now for rent \$4,000 more than given to you. You must exert yourself to place this deal. Can not see what Gillig matter has to do with it, as you have all the facts and figures before you, and if the prospective income was satisfactory when you left here, whatever was done a year or more ago does not affect the sale now."

Mr. Belvin, however, does not recollect ever having received this telegram, but before leaving London he obtained from Gillig a copy of his correspondence with McNally and Rand.

These letters, appellees claim, show that Rand and McNally, in 1890, offered to sell the entire property and business for the sum of \$2,500,000, and while they then stated that they could not promise absolutely all of the stock, still they say that they can probably obtain five-sixths or seven-eighths; that "some of it is in the hands of the members of departments and foremen who would probably want to retain their holdings unless discharged from the service of the company."

On arriving in Chicago, Belvin and Cronkrite had a new interview with Rand and McNally, when, as stated, these letters were produced and some discussion had, and Mr. Belvin went to California. He returned about the 14th or 15th of December, had several interviews with Rand and McNally, and finally, on the 17th of December, Rand and McNally met Belvin, Cronkrite and Johnson in the office of Cronkrite & Co., and had a long interview. Concerning this interview there is a conflict between the evidence of the appellees and the appellants. The appellees (plaintiffs below) claimed that in that interview McNally and Rand authorized them to obtain a contract, sell the property for \$2,750,000, \$1,000,000 in cash, \$875,000 in six per cent debentures, and \$437,000 in preferred stock bearing eight per cent, and \$438,000 in common stock of the company to be organized, which was to succeed to the business of Rand, McNally & Co.; that Rand and McNally agreed to pay the same commission they had agreed to pay under the previous arrangement, viz., \$85,700 in cash and \$64,300 in preferred and common stock of the proposed corporation in proportion as received; that McNally and Rand objected to putting the new arrangement in writing, but said that they had arranged for the stock and that plaintiffs should go ahead and that the defendants would "stand it," or carry out the arrangement.

Immediately after the arrangement of December 17th, Mr. Belvin again went to London. Early in March, 1892, he procured an offer for the purchase of the entire business and property of Rand, McNally & Co.

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When in London, Mr. Belvin employed counsel, Williams & James, and under their direction a proposed contract was executed by Mr. F. B. Behr, the proposed purchaser, by his attorney, and immediately forwarded to Chicago, where it arrived on the 23d of March, 1892.

On the 26th of March, the proposal was sent to Rand and McNally, who returned it through Charles Rand on March 31st. Cronkrite then had an interview with W. H. Rand, who, it is said, "replied, simply, to Cronkrite, that the business was not then for sale; that they had decided not to sell the business and that the contract with them had expired by limitation," and Cronkrite testified that he pressed Rand for his reasons, but he refused to make any further answer. Thereupon Cronkrite sent a telegram immediately to Mr. Belvin, notifying him of the fact, and stating "Rand will not accept contract. Says business is not for sale now, and that our contract expired by limitation and was not renewed in any way."

The proposed agreement was substantially as follows:

"An agreement made the — day of —, one thousand eight hundred and ninety-two, between Messrs. Rand, McNally & Company, of Chicago, United States of America, hereinafter called the vendors, of the one part, and Fritz Bernhard Behr, of 10 Drapers Gardens, London, gentleman, hereinafter called the purchaser, of the other part; whereas, the purchaser has it in contemplation to purchase the business and property of the vendors; and whereas, the vendors have made to the purchaser certain representations and statements in connection with their business and premises, showing the value thereof, which representations and statements have been embodied in a paper writing annexed hereto and hereinafter referred to as the statement; and, whereas, with the object aforesaid of purchasing the property of the vendors, the purchaser intends to form a limited liability company, to be incorporated under English law, to acquire (either directly or through the instrumentality of an American corporation) the said business and property of the vendors, and the purchaser intends that such English com-

pany (hereinafter referred to as the English Company) should be formed with a share capital of four hundred and sixty thousand pounds, divided into forty-six thousand shares of ten pounds each, of which twenty-three thousand shall be preferred shares, entitled to a cumulative preferential dividend at the rate of eight per centum per annum and to priority over other shares in the distribution of assets, and the remaining shares shall be ordinary shares, namely, two hundred and thirty thousand pounds, and with power to borrow sums not exceeding the sum of two hundred and thirty thousand pounds, by an issue of debentures bearing interest at six per centum, to be secured by a first mortgage of all its undertaking. Now, it is hereby agreed by and between the parties hereto as follows:

1. Subject, as hereinafter provided, the vendors shall sell, and subject, as hereinafter provided, the purchaser shall purchase, first, all and singular, the premises and hereditaments of the vendors, particulars of which are specified in the schedule hereto and in the statement annexed; second, all the plant, machinery, buildings, erections, steam engines and other machinery, tools and fixtures appurtenant to the said business and premises as a manufacturing concern, together with all other chattels and effects of the vendors used in connection therewith; third, the stock in trade and the benefit of all contracts and engagements to which the vendors shall be entitled, in relation to the said business at the date up to which the report hereinafter referred to upon the properties hereby agreed to be sold is made (which date is hereinafter called the certified date); fourth, the good will of the said business and the right to use the name of the vendors, and to represent that the purchaser or his assigns is carrying on the business in continuation of the said business of the vendor; fifth, all copyrights, the property of the vendors, and all bills receivable by the vendors, cash in hand, and debts owing to the vendors in connection with the business on the certified date, and all stock held by the vendor firm in other companies in connection with the said business.

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2. The consideration for the said sale shall be the sum of five hundred and sixty-seven thousand pounds sterling, provided that if the English company is formed, as hereinafter provided, the purchase money may be satisfied as to one hundred and eighty thousand pounds part thereof by the allotment of debentures of the English company, of the issue aforesaid as to ninety thousand pounds thereof, by the allotment of preference shares in the English company to that nominal amount, and as to ninety thousand pounds thereof by the allotment of ordinary shares in the English company to that amount, such preference shares to be those numbered from one to —, and the ordinary shares, those numbered from — to —, both inclusive, and such shares shall be issued as fully paid up, and no calls shall be made in respect thereof; the balance of two hundred and seven thousand pounds being payable in cash in the manner hereinafter provided.

3. The business and the said properties of the vendors shall be deemed to have been purchased by the purchaser from the vendors as from the certified date. And it is hereby agreed that from the certified date until the completion of the purchase and of the provisions hereinafter contained, the vendors shall carry on their business in all respects as hitherto with and upon the said premises hereby agreed to be sold and for and on account of the purchaser.

4. In addition to the purchase price aforesaid the purchaser shall allow and pay to the vendor's interest at the rate of five per centum per annum on the respective installments of the said balance of two hundred and seven thousand pounds from the certified date until the installments hereinafter provided shall be respectively paid; and shall also pay interest at the like rate from the certified date on that portion of the purchase money which may be satisfied by the allotment of debentures, until the date when the said debentures are issued, or from that at which interest shall begin to run on the debentures, and shall also pay interest at the like rate from the same date on that portion of the purchase money, which may be satisfied by the allotment

of preference and ordinary shares respectively, until the allottees thereof are entitled to rank for dividend. The payment of the cash must be *pari passu* with the collection of calls on allotment, say the first payment fourteen days after allotment and the balance *pro rata* with the calls made.

5. The said balance of two hundred and seven thousand pounds shall be paid in cash as follows: One-tenth within fourteen days of the issue of the English company's prospectus hereinafter referred to, and the balance by three equal installments, the first within seven days of the first allotment of shares in the English company to the public; the second within six weeks, and the balance within ten weeks after such allotment as aforesaid. Together with each installment shall be paid the interest accrued due thereon, and there shall also be paid with the first installment the interest on the nominal amount of debentures. The several sums hereby agreed to be paid (other than the final balance payable within ten weeks of allotment, and the interest thereon) shall be paid in the first instance to the—bank to the joint account of the vendors and purchaser, to remain in escrow awaiting the completion of the purchase, provided that when the date for completion has arrived the same shall belong to the vendors absolutely, and the purchaser shall execute and do all documents and things necessary to obtain immediate payment to them thereof. On payment of the first installment of the purchase price into the said joint account, the vendors will deposit at the—bank all their documents and evidences of title relating to the property agreed to be sold, and the same shall remain there until completion.

6. The said one hundred and eighty thousand pounds debentures, ninety thousand pounds preference shares, and ninety thousand pounds ordinary shares, shall be allotted within fourteen days of the issue of the English company's prospectus hereinafter referred to. Each of the vendors, or their nominees, shall, if he so long lives, hold in his own name the whole of the shares allotted to him until completion of the purchase, when the certificates of such shares shall be delivered to him.

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7. The profits of the said business, as from the twenty-ninth day of February, one thousand eight hundred and ninety-two, up to the certified date, shall be excepted from the sale, and the profits of the said business for the year ending the twenty-ninth day of February, one thousand eight hundred and ninety-two, shall, as soon as conveniently can, be ascertained, and a sum bearing the same proportion to such last mentioned profits as the period between the twenty-ninth day of February, one thousand eight hundred and ninety-two, and the certified date shall bear to one year, shall be deemed to be the amount of the excepted profits, and such sum shall be paid to the vendors prior to the completion of the purchase, less any sums which shall have been previously drawn by the vendors, or either of them, on account of such profits.

8. The vendors will, at their own expense, prove their title to the whole of the properties hereby agreed to be sold free from incumbrances, good and sufficient in all respect in accordance with the laws of the state in which the specific property is situated, and will also allow any experts or other persons appointed by the purchaser to inspect and examine the premises and business, and all books, papers and accounts connected therewith and subject to the fulfillment of the conditions hereby imposed upon the vendors. The purchase is to be completed upon the payment or satisfaction of the whole of the purchase price, and other moneys payable to the vendors, and as from that time the purchaser is to be let into possession of the properties hereby agreed to be sold.

9. Upon the payment of the purchase money, and other moneys payable to the vendors, and the allotment and delivery as aforesaid, of the debentures, preference and ordinary shares in the English company, the vendors and all other necessary parties will, at their own expense, execute and do all such acts, deeds, assurances, and things as may be reasonably required for vesting in the purchaser, or his nominee, the properties hereby agreed to be sold.

10. The purchaser will, within fourteen days after re-

ceiving notice of the execution by the vendors of this agreement or of a counterpart or duplicate hereof, appoint some member of the firm of Messrs. Turquand, Young & Co., of London, accountants, or, failing them, some other well known accountants, and, if necessary, other persons, to examine the properties hereby agreed to be sold, and will procure such person or persons to report to him the result of his or their examination with all convenient speed, and will take his or their opinion or report thereon as to the value thereof, and if such accountant or other person or persons appointed by the purchaser, shall substantially confirm the facts and representations set forth in the reports to the purchaser that the said properties hereby agreed to be sold are of such value, and that the income to be derived therefrom is of such an amount, and the business carried on there is of such a volume and nature as respectively set out in the statement annexed hereto, and generally that the representations set out in such statement are true and accurate, the purchaser shall proceed with this agreement, but if such accountant or other person or persons as aforesaid shall not substantially confirm the said facts and the said statement, and the representations contained therein are not accurate and true, then the purchaser shall be at liberty, within fourteen days after the first receipt by him of such report, but not later, to put an end to this agreement by giving to the vendors notice in writing or by cablegram of such his determination, it being understood that this agreement is based upon the statement in this clause referred to. In the event of the purchaser putting an end to this agreement under this clause the vendors shall have no claim upon him in respect of this agreement or otherwise whatsoever. Any notice to be given hereunder by the purchaser to the vendors may be given by sending the same to them either by letter or cable addressed to them at 166-168 Adams street, Chicago.

11. The instructions given to the experts, accountants or other person or persons appointed to make such inspections or examinations as aforesaid, shall be a copy of this

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agreement and statement, and they shall be directed to ascertain the profits realized in the vendor's business and the value of the buildings, good will and assets to be transferred to the English company, so far as the same are set forth in the said statement.

12. The vendors will, upon the execution hereof by them, deposit at the _____ bank, in the joint names of themselves and the purchaser, a sum of \$4,000 (four thousand dollars), which shall be handed to the said accountants or experts on their leaving America, provided that if the purchaser shall determine on their report to complete this contract, he shall, on the completion of the purchase, repay the said \$4,000 to the vendors.

13. The vendors will, if so required by the purchaser, use their best efforts to procure the continuance of the services of the staff and employees now connected with the said business, when the same is handed over to the purchaser.

14. The purchaser shall (subject to this power of determining this agreement hereinbefore contained), within forty-five days of the first receipt by him of a report on the said properties, procure the incorporation under the English companies acts, of a company with liability limited by shares, and having for its object (among other things) the acquisition of the property hereby agreed to be sold, and with a nominal capital of four hundred and sixty thousand pounds, divided into twenty-three thousand ordinary shares of ten pounds each, and twenty-three thousand preference shares of ten pounds each, conferring the right to a fixed cumulative preferential dividend at the rate of eight per cent per annum, and also ranking, as regards capital, in priority to the ordinary share, and with power to issue first mortgage debentures to an amount not exceeding two hundred and thirty thousand pounds, bearing interest at six per cent per annum, and charged on the English company's undertaking; the memorandum and articles of the English company shall not be registered until they have been submitted to and approved of by the vendors or some one on their behalf.

15. The purchaser will procure the English company, as soon after its incorporation as is reasonably prudent, having regard to the then state of the London money market, to offer for public subscription, by a prospectus, the whole of the shares in the capital of the English company, less those to be taken by the vendors pursuant to this agreement, and any additional shares to be taken as part of the purchase price paid by the English company; also the whole of the two hundred and thirty thousand debentures of the English company, less those to be taken by the vendors pursuant to this agreement, and any additional debentures to be taken as part of the purchase price to be paid by the English company, and the purchaser shall use his best endeavors to place such shares and debentures, provided that if the purchaser is unable to satisfy the vendors, within four calendar months from the date of the said report, that responsible persons other than the vendors have agreed to subscribe for shares and debentures to an amount deemed satisfactory by the vendors, or that shares and debentures to the like amount are underwritten, then the vendors may, by notice in writing to the purchaser, rescind this agreement.

16. The first directors of the English company shall be seven in number, of whom three shall be nominated by the vendors.

17. The purchaser hereby undertakes that the English company's shares (other than those to be taken as fully paid) shall be payable by such installments as shall enable the purchase money to be paid at the times and in the manner aforesaid.

18. The purchaser is at liberty to transfer the benefit of this agreement or to re-sell the properties hereby agreed to be sold at a profit to the English company direct, and in such event the term "Purchaser" is to be considered (unless repugnant to the context) to mean as well such English company as the said F. B. Behr.

19. The purchaser shall cause a sufficient agreement to be filed with the registrar of joint stock companies before any shares are allotted as part of the purchase price.

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20. If any part of the purchase money remains unpaid or unsatisfied for six calender months from the date of the said report the vendors may, by such notice to the purchaser, rescind this agreement, but such rescission shall be without prejudice to the vendors' right to interest on the purchase money up to the date of rescission.

21. For the purposes of this agreement, any notice may be served on the purchaser by sending the same through the post, or by cablegram addressed to him at 10 Drapers Gardens, London, and shall be deemed, if sent through the post, to have reached him in due course of post, or if sent by cablegram to have reached him the same day.

In witness whereof, the said parties have hereunto set their hands."

There was a finding and judgment for appellees for \$10,000.

GEO. L. PADDOCK and H. T. GILBERT, attorneys for appellants.

FLOWER, SMITH & MUSGRAVE, F. J. SMITH and HENRY W. WOLSELEY, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The question presented by this case is almost entirely one of fact, viz: Did the appellees make such a sale of the property or stock of appellants as entitled them to compensation therefor?

Appellees did not make a sale in accordance with the written power of attorney, which sale was to be for \$2,000,000 cash in hand and \$1,500,000 in paid up stock of a corporation capitalized at \$4,500,000; this is not claimed. Appellees claim that a new arrangement was made, under which they were to sell the property for \$1,000,000 cash, \$875,000 in six per cent debentures, \$437,000 in preferred stock bearing eight per cent, and \$438,000 in common stock—total \$2,750,000. Did they make such sale?

The proposed agreement for sale procured by the appell-

lees, recited that the purchaser intended to form an English company with a capital share of 460,000 pounds, divided into 46,000 shares of ten pounds each, of which 23,000 should be preferred shares, entitled to a cumulative preferential dividend of eight per cent per annum, and the remaining ordinary shares with power to borrow not exceeding the sum of 230,000 pounds by an issue of debentures.

The consideration for the sale was to be 567,000 pounds sterling, provided that if the English company was formed the purchase money as to 180,000 pounds might be satisfied by the allotment of debentures of the English company, and as to 90,000 pounds by the allotment of preference shares in the English company to that nominal amount, and as to 90,000 pounds by the allotment of ordinary shares in the English company.

The balance of 207,000 pounds was to be paid in cash as follows: one-tenth within fourteen days of issue of the English company's prospectus, and the balance by three equal installments, the first within seven days of the first allotment of shares in the English company, the second within six weeks, and the balance within ten weeks after such allotment.

The several sums agreed to be paid, other than the final balance, and the interest thereon, to be paid in, the first to the —— bank to the joint account of the vendors and purchaser, to remain in escrow awaiting the completion of the purchase. The purchaser was, within forty-five days of the receipt by him of a report on the properties, to procure the incorporation of the said English company, and as soon as was reasonably prudent, having regard to the then state of the London money market, offer by a prospectus for public subscription the whole of the shares in the English company, less those to be taken by the vendors, also all the debentures, less those to be taken by the vendors, provided that if the purchaser should be unable to satisfy the vendors within four months from the date of the said report that responsible persons, other than the vendors, had agreed to subscribe for shares and debentures deemed satisfactory to the vendors, or that shares and debentures to the like amount

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were underwritten, then the vendors might rescind the agreement, and if any part of the purchase money should remain unpaid for six months from the date of the said report, the vendors might by notice rescind the agreement.

We do not see how it can be seriously contended that such proposed sale was a fulfillment of an undertaking to sell for \$1,000,000 cash and \$1,750,000 in stock and debentures.

The proposition was perhaps fair enough, but appellants did not see fit to accept it, and they did not authorize appellees to sell or to procure an offer under which appellants might never receive either cash or anything else of value.

The offer of payment, so far as it had value, was wholly contingent upon the success that might follow an offer for sale of the stock and debentures of the proposed English company.

It is said that Mr. Rand did not put his refusal to accept the offer upon the ground that it was not in accordance with the terms he had given appellees. If this be so, it did not make the offer a compliance with such terms. Appellees claim to have procured a *bona fide* offer of purchase from a responsible party on the terms proposed by appellants. The question is, did appellees procure such offer, not what appellants said about the proposal.

Appellees urge that appellants having placed their refusal upon the ground that the time for making a sale had expired, can not now object that they had never authorized a sale upon the terms proposed; and appellees cite the remark of the Supreme Court of the United States appearing in *Railway Co. v. McCarthy*, 96 U. S., page 258-267, that "where a party gives a reason for his conduct and decision, touching anything involved in the controversy, he can not after litigation has been begun, change his ground and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

As applicable to the facts of that case the statement was proper and pertinent, but if cited as a declaration of the law as to all controversies, it is incorrect and entirely unsupported by authority.

It is not the case that if one agree to purchase 100 fat sheep if delivered to him in thirty days, he is responsible in damages when 100 lean hogs are tendered to him in twenty days, if the only objection he makes to their reception is that the contract has expired. Nor is one who borrows money, agreeing to pay in six months with interest at the rate of four per cent per annum, bound to pay interest at the rate of seven per cent per annum because when, at the end of six months, payment with such interest is demanded, his only objection is, that the debt is not due.

The principle invoked by appellees applies only to defects in form, matters of detail, objections which a party could easily have, and it is to be presumed would have, removed had they been objected to, so that an after insistence upon them is an injustice, they not being of the substance of the contract. *Johnson v. Oppenheim*, 55 N. Y. 291; *Bigelow on Estoppel* (5th Ed.), p. 662; 28 Am. and Eng. Ency. 530, and cases cited.

There is no authority for holding that a mere arrangement for a sale, with no cash paid down, but a condition that if at the end of six months all the cash has not been paid, the vendors may rescind the contract, is a fulfillment of an authority to sell for, among other things, \$1,000,000 cash.

That where, by express or implied contract, an agency has been created to endure for a definite period, it may not be terminated by the principal unless for the agent's default, or by virtue of some agreement to that effect, without liability to the agent, is the case.

And where, though the agency is not for a definite time, yet the act is one which requires time and labor for its completion, the agent is entitled to a reasonable time within which to complete his undertaking. *Mechem on Agency*, Sec. 620; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378; *Warren C. & M. Co. v. Holbrook*, 115 N. Y. 586; *Day v. Porter*, 60 Ill. App. 386.

And if the principal unjustifiably terminate the agency, he is liable to the agent for the damages occasioned thereby,

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as in any other case of a breach of a contract. Mechem on Agency, Sec. 621.

We are not, however, called upon to say what the rights of appellees would have been had they, when the proposed contract of sale was rejected, gone on and effected a sale in accordance with the authority given to them. Instead of doing this, or insisting upon their right so to do, they stood upon the proposal by them procured and tendered, sending to appellants the following letter:

“GENTLEMEN: You authorized us to procure for you a purchaser for all the property belonging to Rand, McNally & Company, a corporation, upon certain terms and conditions. After much labor and expense, we have procured a purchaser, who is ready, able and willing to purchase the property of the corporation for the price and upon the terms and conditions named by you, and we have a contract signed by him for the purchase of the property, which we are ready to present to you for signature.

Will you kindly advise us, upon the receipt of this letter, when and where we can meet you and close the matter up?

Yours truly,

B. F. CRONKRITE & Co.”

Thus claiming that the terms of sale agreed to by Mr. Behr were such as appellants had agreed to accept.

Appellees rested and rest upon this proposition; they do not claim to have done more than this.

Such proposition was not a fulfillment of the undertaking of appellees.

The judgment of the Circuit Court is reversed and the cause remanded.

E. S. Karoly Electrical Construction Company v. Globe Savings Bank.

1. **FORGERY—Must be an Intention to Defraud.**—If a person makes his note by an assumed name, such note will bind him; so too, if, passing himself as bearing the assumed name, he receives checks intended

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for him but payable to the order of the assumed name, his indorsement thereon of his assumed name will bind him, and if there is no intent to defraud and no one is defrauded, there is no forgery in the transaction.

2. **SAME—Fictitious Names—Fraudulent Intent.**—It is only where the false or fictitious name is assumed for the purpose of fraud that forgery can be predicated of the act.

Assumpsit on checks. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed April 27, 1896.

STATEMENT OF THE CASE.

Appellant having received two checks payable to the order of G. Rudelius, and apparently indorsed by him, deposited them with appellee and received credit for the amount thereof. The Metropolitan National Bank, on which the checks were drawn, paid the sum they called for to appellee, which last mentioned bank, upon being told that the indorsements "G. Rudelius" were forgeries, repaid the Metropolitan Bank; whereupon appellee brought suit against its depositor, appellant, and recovered a judgment for the amount represented by the two checks, \$936.18.

The evidence upon the trial was as follows:

Daniel H. Tolman testified: "I am a dealer in commercial paper. Am acquainted with the defendant company, also with E. S. Karoly, its president. I have examined the two checks handed me by attorney for plaintiff, and recognize them as checks drawn by me on the Metropolitan National Bank in Chicago."

Checks with their indorsements offered in evidence, viz: No. 80. CHICAGO, April 15, 1895.

The Metropolitan National Bank of Chicago:

Pay to the order of G. Rudelius, four hundred and forty-five dollars (\$445). D. H. TOLMAN.

(On face of same:) Accepted. Payable through Chicago Clearing House, April 15, 1895.

METROPOLITAN NATIONAL BANK, per WEGNER.

(Indorsement on back:) G. Rudelius, E. S. Karoly.

ELECTRICAL CONSTRUCTION CO., by E. S. KAROLY.

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Globe Savings bank: Paid April 16, 1895.

Pay through Chicago Clearing House, to North-Western National Bank.

No. 108.

CHICAGO, April 20, 1895.

The Metropolitan National Bank of Chicago:

Pay to the order of G. Rudelius, four hundred and eighty dollars (\$480). D. H. TOLMAN.

(On face of same:) Accepted. Payable through Chicago Clearing House, April 20, 1895.

METROPOLITAN NATIONAL BANK, per WEGNER.

(Indorsements on back:) E. Rudelius, E. S. Karoly.

ELECTRICAL CONSTRUCTION CO., by E. S. KAROLY.

Globe Savings Bank: Paid April 23, 1895.

Pay through Chicago Clearing House, to North-Western National Bank.

And thereupon the witness Tolman further testified:

I delivered these checks as the proceeds of two notes, which I have discounted at the request of the man to whom I delivered the checks. The checks were delivered by me on the day of their respective dates. The money on the checks was afterward refunded to me by the Metropolitan National Bank, through whom I learned the indorsement, "G. Rudelius," was a forgery. Upon being so informed, I went to a man by the name of G. Rudelius, whose place of business is 172 South Clark street, in this city. I there saw a man who answered to the name of G. Rudelius. As soon as I saw him I knew he was not the man with whom I had had my dealings. I said to the man, "Are you G. Rudelius?" He said "Yes." I then said to him, "Well, you are not the man I have been doing business with." I showed him the two checks which have been offered in evidence; he said that the indorsement "G. Rudelius" on each of the checks was not his signature; he agreed to, and did make an affidavit to that effect.

After Mr. Rudelius had pronounced the indorsements on the checks forgeries, I had an interview with E. S. Karoly, the president of the defendant company, and he told me that when he came to me with the man who claimed to be G.

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Rudelius, and to whom I gave the checks, he, Karoly, thought that the man's name was really G. Rudelius, but he has since learned that his name was not G. Rudelius, but that he was a man known as "Herman Fred."

Cross-examination :

The notes for the proceeds of which these checks were given, were notes of the defendant, E. S. Karoly Electrical Construction Company. The man to whom I gave the checks called himself G. Rudelius. I dealt with him by that name; the same man introduced Mr. Karoly to me, as president of the defendant company. Mr. Karoly, in the presence of this same man, and at my request, furnished me a written statement as to the financial condition of the defendant company. When this man who called himself G. Rudelius came in and said to me, "Mr. Tolman, this is Mr. Karoly," I said, "O, yes, I know Mr. Karoly, he formerly put the electrical works into my bank."

G. Rudelius testified : "My name is G. Rudelius, and my place of business is 172 South Clark street, in this city. I have examined the indorsement, 'G. Rudelius' on the back of each of the checks introduced in evidence. It is not my signature. I first saw these checks in the possession of Mr. Daniel H. Tolman, who showed them to me. After he called on me, E. S. Karoly also called at my place of business, and talked with me about this matter, and I told him the same thing.

I am acquainted with one Herman Fred; he at one time had desk room in my office."

Wilbur B. Ervin testified : "The proceeds of the first check were paid by the plaintiff to the defendant, April 15, 1895; the proceeds of the second check were paid by the plaintiff to the defendant April 22, 1895."

The plaintiff's counsel then offered in evidence two deposit slips, reading respectively as follows :

GLOBE SAVINGS BANK,

Dearborn and Jackson streets.

Credit to the account of E. S. Karoly, Electrical Construction Co.

\$480.

CHICAGO, 4-22-1895.

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These slips were deposited in our bank by the defendant, together with the checks that are in evidence.

On July 3, 1895, we were notified by the Metropolitan National Bank, that the indorsement of the name G. Rudelius on the checks were forgeries, and we thereupon repaid the Metropolitan National Bank by our check."

Witness resumes: "The defendant has never reimbursed us, and now owes the plaintiff the sum of \$936.18, being the sum of the checks and interest at five per cent from July 5, 1895.

OMOHUNDRO & WOODWARD and DAVID J. WILE, attorneys for appellant.

EDWIN C. CRAWFORD, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It appears that these checks were made payable to a man who called himself, and was believed by the maker of the checks to be, G. Rudelius. This man, who was dealt with as, and who called himself, G. Rudelius, has never since been seen.

There is nothing to show that this man did not indorse the checks; no evidence that the name G. Rudelius was written by any other person. In brief, no showing that his name was forged.

The fact that a man named G. Rudelius has been found who testifies that the signatures on the backs of the checks are not his, does not establish that the signatures are not those of the man to whose order the checks were made payable; more especially when it is admitted that the witness, G. Rudelius, is not the person with whom the maker of the checks dealt.

Neither does the fact that appellant, who introduced to Tolman the man calling himself "G. Rudelius," afterward told Tolman that he had been mistaken and that the name of the man was "Herman Fred" prove the indorsements "G. Rudelius" to have been forgeries.

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If Herman Fred had made his promissory note by the name of G. Rudelius, such note would have bound him. So too, if Herman Fred, passing himself off as bearing the name of G. Rudelius, received checks intended for him, Herman Fred, payable to the order of G. Rudelius, his indorsements thereon of his assumed name bound him, and there being no intent to defraud and no one being defrauded, would not be a forgery. Bishop on Crim. Law, Vol. 2, Sec. 596; *Regina v. Hodgson*, 36 L. & Eq. 626.

On the other hand, if the witness, G. Rudelius, had indorsed his name thereon with intent to defraud and had thus defrauded the person for whom the checks were intended and belonged, he, G. Rudelius, would have been guilty of forgery. Bishop on Criminal Law, Sec. 584.

Every John Smith can not lawfully indorse checks payable to a particular John Smith.

The question in the case at bar was not strictly whether a forgery had been committed, but whether the name G. Rudelius had been indorsed upon the checks by the person to whose order by that name the checks were made. *Hoge v. First Nat'l Bank*, 18 Ill. App. 501; *Shearer v. Pacific Exp. Co.*, 43 Ill. App. 601; *Same*, 160 Ill. 215.

Upon this the burden was upon appellee to show that the checks had not been so indorsed. Appellee alleged that it had accepted the checks upon a forged indorsement. This it did not prove.

The judgment of the Superior Court is reversed, and the cause remanded.

MR. P. J. GARY, ON PETITION FOR REHEARING.

The petition misses the point decided. Karoly went with somebody (Fulano, as the Spaniards say) to Tolman and induced Tolman to discount notes made by the appellant, of which Karoly was president, and with Karoly's approval Tolman gave to this Fulano checks. This Fulano, who alone had any right to the checks, indorsed them in the name which—whether true or false makes no difference—he bore in that transaction. The real Rudelius—if there be but one

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—real one—had no interest in the business, no concern with it.

Karoly might permit the proceeds of the discount he procured to go where he pleased, and placing them in the possession and control of this Fulano as his own, by any name then truly or falsely borne by him, made his indorsement—not a forgery—but a genuine indorsement by the right man.

If Tolman has canceled or returned the notes made by the appellant, then no injustice is done by this judgment; but the record is silent on that point. In the absence of all history of the notes, no reason appeared why a transaction, concurred in by all parties interested, should be ripped up upon an abstract conjecture that Karoly carried the proceeds of a discount of the paper of his company by one banker, to the credit of his company in another, by means of a harmless fiction.

Thomas A. Broadbent, Adm., etc., v. Chicago and Grand Trunk Railway Company.

1. **ORDINARY CARE—Need Not be Shown by Affirmative Evidence.**—In an action for personal injuries based upon the negligence of the defendant the exercise of ordinary care is an essential element of the plaintiff's case; but it is not indispensable that it should be directly shown by affirmative evidence.

2. **SAME—The Jury May Take Notice of the Natural Instinct of Preservation.**—There is in all men a natural instinct of self-preservation, and such instinct is an element of evidence in cases of personal injuries founded upon the negligence of the defendant, of which the jury may take notice, and, in the absence of all testimony upon the subject find that a deceased party, in obedience to such instinct exercised that care for his safety which a prudent man would have made use of under the same conditions.

3. **NEGLIGENCE—Not Conclusive Proof.**—The fact that a person was standing on the track of a railroad when injured, is not conclusive proof of negligence.

Trespass on the Case.—Death from negligent act. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed April 27, 1896.

HATCH & RITSHER, attorneys for appellant.

SAMUER B. FOSTER, attorney for appellee; SAMUEL W. JACKSON, of counsel.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action brought to recover damages caused to the next of kin by the death of William J. Francisco, whose death is alleged to have been occasioned by the negligence of appellee.

The court below instructed the jury to find for the defendant; this instruction was apparently given because of the opinion of the court that there was no evidence showing that the deceased was, when injured, in the exercise of ordinary care.

At the time of the accident the deceased was, with a Mr. Benedict and a Mr. Glover, crossing the tracks of appellee at the intersection with Sixty-third street, in the city of Chicago. The day was May 10, 1892, the hour about half past seven in the evening. It was a misty day. It had been raining from half past six to seven, and was a misty night.

The deceased was struck by a wrecking train pushed by an engine; the derrick or forward car had no head-light upon it; the conductor of the train stood upon this car, holding a lighted lantern. The train was moving at a speed of from twenty-five to thirty miles an hour. The crossing gates were up. Mr. Benedict was killed at the same time that Mr. Francisco was, and there was evidence that the plaintiff had endeavored to find Mr. Glover, so as to call him as a witness, and had failed.

While it is true that in an action for personal injuries, based upon the negligence of the defendant, it is an essential element of the plaintiff's case that the injured party must have been in the exercise of ordinary care, yet it is not indispensable that such fact should be directly shown by affirmative evidence. There is in all men a natural instinct of self-preservation, and such instinct is an element of evi-

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dence of which the jury may take notice, and, in the absence of all testimony upon the subject, find that a deceased party, in obedience to the ordinary instincts of mankind, exercised that care for his safety which a prudent man would, under the same conditions, have made use of. *Johnson v. Hudson Ry. Co.*, 20 N. Y. 65-69; *Allen v. Willard*, 57 Penn. St. 374-380; *Northern Ry. Co. v. Price*, 29 Md. 420-436; *C. & E. I. Ry. Co.* 132 Ill. 161; *I. C. R. R. Co. v. Nowecki*, 46 Ill. App. 3; *Same v. Same*, 148 Ill. 29; *Penn. Co. v. Frana*, 112 Ill. 398-405; *C. St. L. & P. Ry. Co.*, 120 Ill. 587.

Nor is it conclusive proof of negligence that one, when injured, was standing upon the track of a railroad. *Northern Ry. Co. v. Price*, 29 Md., *supra*.

The question of whether the deceased was, when struck and killed, in the exercise of ordinary care, should, under proper instructions, have been left to the jury.

The judgment of the Circuit Court is reversed and the cause remanded.

Ezra McCord et al. v. James H. Gilbert et al.

1. *SALES—Change of Ownership and of Possession—Good Faith.*—A man in financial distress, who has sold out his business to one set of his creditors, is not required to abstain from making his living as an employe in connection with his former business, nor is the purchaser of his business required to exclude him from employment about it. Good faith in the transaction being required.

2. *SAME—Evidence of Change of Possession.*—The fact that a portion of the creditors of an insolvent person bought out his business and placed the word "Agent" after the name of the seller over the door, is sufficient to put persons upon inquiry as to such agent's right about the place.

Replevin.—Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded with directions. Opinion filed April 27, 1896.

FREDERICK W. PACKARD, attorney for appellants.

McGLASSON & BERTLER and **D. H. PINNEY**, attorneys for appellees.

64	233
79	315
64	233
84	269
64	233
95	317
64	233
97	628

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action of replevin brought by the appellants against the appellees, in which there was judgment for the appellees, and *retorno habendo* awarded.

On April 2, 1891, Alvin G. Kuhns gave a chattel mortgage to the appellants, Ezra McCord and William L. Goggin, covering the contents of a certain saloon in Chicago, consisting of liquors and saloon fixtures.

The mortgage was given to secure \$6,000, of which \$4,000 was payable to McCord and \$2,000 to Goggin, according to Kuhns' promissory notes payable in ten months, with six per cent interest.

Some time between the giving of that mortgage and the thirteenth of the same month, McCord and Goggin took possession of the saloon and contents under said mortgage, and kept possession thereof under the mortgage, until on said April 13th, when Kuhns executed and delivered to them an absolute bill of sale of the same property, in consideration of \$3,500 indorsed on his said mortgage notes.

On the same day of the execution of said bill of sale, Kuhns assigned to McCord and Goggin, with the written consent of the landlord, the lease he held of the saloon premises for a term expiring April 30, 1892, at the annual rental of \$3,120, payable in monthly installments of \$260, and the insurance policies were also transferred to them.

After that was done McCord and Goggin hired Kuhns at a salary to run the saloon for them, and also hired two other bar tenders and a porter, who seem to have been the same persons who had formerly worked for Kuhns.

To the name "Al. Kuhns," by which the place was known, there was added the word "Agent," where it appeared over the door, but no change was made in the name where it appeared on the window. The name of McCord & Goggin was not displayed anywhere about the saloon. McCord was a real estate dealer, handling his own property principally, and Goggin was and had long been in the bottled beer business. They do not appear to have been partners in any other business, but the effect of their relations in con-

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nection with this business seems to be that of a partnership. They immediately opened a bank account in the firm name of McCord and Goggin, and Goggin went to the saloon every day and took the cash that had been received in the cash drawer or register, and deposited it to their account in bank. Goggin seems to have done the ordering of goods, etc., and to have paid the bills generally, although McCord appears to have sometimes signed checks, but all bills against the business seem to have been paid by the firm of McCord and Goggin, and usually by checks drawn by one or the other of them, with the exception of some small bar supplies for daily use, such as lemons, which Kuhns sometimes bought and paid for out of cash taken in. Kuhns, however, never paid any other bills.

It also appears that about the time McCord and Goggin opened the business, they contributed to their bank account funds of their own, derived from entirely independent sources, as capital for running the business.

In November, 1891, McCord and Goggin took a new lease from the landlord of the premises for a further term of three years from the time of the expiration, on April 30, 1892, of the lease that was assigned to them by Kuhns, at a rental of \$4,000 per annum, and, although the trial court refused to admit offered evidence of the payment by them of the rent that had accrued under either or both of the leases, it is a reasonable presumption, from the fact of their continued occupation of the premises, that they did pay all such rent.

After the new lease had been obtained, McCord and Goggin, in or about the spring of 1892, sold substantially all the old fixtures and furnishings to one Preston, and received the pay therefor, and procured new ones in place of the old, to be made and set up for them, by the Brunswick-Balke-Collender Company, at a cost of \$3,200, paid by McCord and Goggin.

Other additions and substitutions, both of fixtures, furniture and stock, were made and paid for by McCord and Goggin, so that at the time of the execution levy in question,

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there remained on or about the premises only a chandelier, four gas brackets, and perhaps a small amount of liquor, that was there when McCord and Goggin took possession of the place.

Under these circumstances and conditions, McCord and Goggin remained in possession of the saloon and conducted the business down to the time of the levy of the execution writ in question.

At the time the mortgage and transfer referred to were made, Kuhns was indebted to the appellee, McNeil and Higgins Company, for goods delivered by that corporation to him in the preceding January, and for that indebtedness a judgment for \$437.25 was recovered in June, 1892. Upon such judgment an execution was issued, and on September 2, 1892, levied on fixtures and goods so in possession of McCord and Goggin, and all of which, with immaterial exceptions, had been bought and paid for by McCord and Goggin.

Thereupon, this suit in replevin was brought by McCord and Goggin, and judgment having been rendered against them upon a trial before the court, without a jury, and a *retorno habendo* awarded, the case is brought here by appeal for review.

The facts can scarcely be said to be in dispute. But it is insisted by the appellees that, as the trial court doubtless held, there was no change of possession from Kuhns to the appellants, McCord and Goggin, and that in law the transfer was fraudulent as to the appellees, who were existing creditors of Kuhns.

There can be no question from the record of the *bona fide* character of the indebtedness by Kuhns to McCord and Goggin. It was not questioned on the trial below, and is not questioned here. And it is just as certain from the evidence, that, as between Kuhns and McCord and Goggin, the transfer was a *bona fide* one, and that by it all interest which Kuhns had in the saloon and its contents passed, as between the parties, to McCord and Goggin. The mere circumstance that Kuhns testified that he supposed that if he could get

the money to-morrow to pay up what he owed to McCord and Goggin he could get the place back again, should not prevail over all the other evidence in the case. He testified also, that there was no agreement to that effect, and that his only remaining interest in the place was to obtain a salary until he could do better elsewhere. Such a hope, or supposition, is one that every debtor who has lost his business is quite likely to indulge in, and from the circumstance that after the consideration of the sale was credited upon his notes he was left indebted to McCord and Goggin in the sum of \$2,500, it is not unlikely that McCord and Goggin, as business men, would gratify his supposition in that regard.

It is not in every case where the vendor is engaged to run a business sold out by him that the sale is fraudulent as to other creditors. A man in financial distress, who has sold out his business to one set of creditors, is not required to abstain from making his living as an employe in connection with his former business, nor is the purchaser of his business required to exclude him from employment about it. Good faith in such matters is absolutely required, and what will amount to notice of the change in ownership is essential. The good faith was abundantly established, and is hardly questioned, but it is insisted that the open and visible evidence of delivery and possession which the law requires, did not take place.

We do not think the retaining of the name "Al. Kuhns" on the window should prevail against the other evidence of change of possession. Although we do not find it so testified to, yet we may reasonably know that a drinking saloon acquires a reputation from the name that is attached to it, which is of value to it as a resort, and which continues to cling to the saloon long after many changes in ownership occur; and we do not think that McCord and Goggin were required to destroy that value by removing the name. It was rather indicative of the place than of ownership. Kuhns had long been engaged in the saloon business at that location, and in a large city the name of a resort, whether it be

of a saloon or a theatre, carries with it a reputation attractive to strangers as well as acquaintances, which is often of great value entirely independent of the mere fact of proprietorship.

Unless, therefore, the retention of Kuhns in the employ of the vendee made the sale a fraudulent one, which, under the circumstances, we do not think it did, the levy was wrongly made. To any person who had occasion to investigate, his name over the door with the word "agent" appended, would indicate enough to put such a person upon inquiry as to his rights about the place.

Furthermore, as to appellees, they must have known, from the fact that their bill had remained unpaid, that Kuhns was not prospering, and when they saw the expensive changes that were made by McCord and Goggin in all the fixtures and fittings of the saloon, it was reasonable notice to them of the change of ownership that had occurred, even though they did not have other actual notice concerning which there was some evidence that they did have.

We do not regard this as a case of leaving the possession of the goods in the vendor, and therefore one falling within the rule that has prevailed in this State ever since the case of Thornton v. Davenport, 1 Scam. 296, that all sales of chattels where possession is permitted to remain with the vendor are fraudulent *per se*, and void as to creditors and subsequent purchasers, "unless the retaining of possession be consistent with the deed," or bill of sale.

We regard the evidence as establishing clearly every element necessary to a change of possession, except the single fact that Kuhns was employed to assist in running the business, and in his hired capacity did continue to attend bar in the saloon. The evidence shows that he exercised no other capacity or authority about the place, and had none other. McCord and Goggin were not required to place their own names upon the saloon signs. We are aware of no law that requires a business man to do that.

We consider that every essential of good faith and actual

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change of possession that the law requires, was done, and that the execution levy upon the property, as being in law that of Kuhns, was wrongful.

Furthermore, the property levied upon never belonged to Kuhns, with but trifling exceptions, if any, but was property that McCord and Goggin had bought and paid for with their own funds, and it would be grossly unjust to deprive them of it under the proved facts and circumstances.

We can not concur with the learned trial judge in the conclusion reached by him, and must reverse the judgment and remand the cause, with directions to the Superior Court to give judgment for the appellants. Reversed and remanded, with directions.

MR. JUSTICE GARY does not participate.

Michael Wagner et al. v. E. Percy Maynard.

1. **TRUSTS—When They Arise.**—A trust will not result to one who pays a part only of the purchase money of land conveyed to another; unless it be some definite part of the whole consideration, it can only arise from the original transaction and at the time it takes place.

2. **RESULTING TRUSTS—When They Arise.**—A resulting trust can only arise in favor of a person who furnishes the consideration money, or some aliquot part thereof, as part of the original transaction, at the time of the purchase.

3. **SEALED CONTRACTS.—Not to be Altered by Parol Agreements.**—Parol agreements whether prior, contemporaneous, or subsequent, are, in the absence of fraud, impotent to alter or annul a sealed contract.

4. **EQUITY PRACTICE—Bill When Controlled by Exhibits.**—Allegations in a bill of what is contained in a writing which is attached to as an exhibit and made a part of the bill, will be controlled by the writing and not by what is alleged of it.

Bill in Chancery, to recover trust funds. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

FARSON & GREENFIELD, attorneys for appellants.

OTIS & GRAVES, attorneys for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree sustaining a demurrer to the amended bill of the appellants, and, the appellants electing to stand by their amended bill, dismissing the original and amended bills for want of equity.

The appellants, Wagner and Baltes, contracted with one Anderson to build for him ten houses upon twenty lots of land, two of which lots were owned by the appellee, and commenced the construction thereof. Before any of the houses were completed the appellants discovered that Anderson was insolvent, and had no interest whatever in the lots. They thereupon interested one Denman in the matter, and after some negotiation Denman entered into separate written agreements with the owners of the twenty lots, whereby the legal title to the lots should be conveyed to Denman and the houses be completed by him.

The portions of the agreement so entered into between Denman and the appellee as to the two lots owned by the latter, were so far as is material to the questions here involved, substantially as follows:

In consideration of the deeding by appellee to Denman of the two lots, Denman agreed to complete the building theretofore begun and partially constructed thereon by Wagner and Baltes, and as soon as completed to endeavor to sell the lots and building for a sum not less than \$2,850. When sold, thirty per cent of the purchase price should be paid to appellee provided that no more than \$850 should be paid to him, that being the agreed price of the said two lots.

And concerning such purchase price, the agreement provided that Denman should be a "trustee of the purchase price of said property until said second party (appellee) receives the said sum of \$850," and that he would "receive and hold in trust the said thirty per cent of the purchase

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price of the said property for the use and benefit" of appellee up to the said sum of \$850.

It was also provided in the agreement, that at any time prior to the sale of said premises, or the final payment of the said \$850 to the appellee out of the price received for said premises, Denman should have the option of paying to appellee the whole of the said \$850, or any part thereof remaining unpaid, and have a quit-claim deed to the premises.

And by another clause of the agreement, it was expressly agreed that when Denman should have paid appellee the sum of \$850 out of the purchase price of said property, or from any other source, he should be entitled to the cancellation and delivery of the contract, and to have a quit-claim deed of the premises.

And again, by another clause, it was expressly agreed by appellee that he would at any time, upon payment of \$850 being made to him, cancel said agreement and deliver to Denman a quit-claim deed of the property.

That agreement was dated September 19, 1891, and the only parties to it were Denman and the appellee. The appellants, Wagner and Baltes, were not mentioned in it, except in identifying the building as being one partially constructed by them.

Subsequent to the said agreement between Denman and appellee, the appellants, Wagner and Baltes, entered into a written agreement with Denman, bearing date October 5, 1891, whereby Wagner and Baltes agreed to build and complete the entire ten houses for Denman for the sum of \$20,000, for which Denman agreed to pay them by giving them seventy per cent of the purchase price he should receive when he succeeded in selling the houses and lots, or either of them.

To this last contract appellee was not a party, and was in no way mentioned in it. Both contracts were under seal, but neither one was recorded, but the bill alleged that Wagner and Baltes had full knowledge of the one between Denman and appellee, and of all the facts and circumstances which led to it; and that appellee had full knowledge of

the terms and conditions, and approved of the one between Denman and Wagner and Baltes, and of the relation of Denman to the property as between himself and Wagner and Baltes.

Besides alleging the foregoing facts, the bill alleged that it was understood and agreed at the time said contracts were made, and at various times thereafter, between Denman, and Wagner and Baltes, and the appellee, that Denman should make effort to procure a loan upon the property, in the event that a sale could not readily be made, and from the proceeds of said loan turn over to Wagner and Baltes seventy per cent thereof to apply on the price to be paid to them for constructing the houses.

It was also alleged that Wagner and Baltes completed all the houses, including the one standing on the two lots of appellee, and received no money or any other consideration on account thereof; that after the houses had been completed Denman sold the house and two lots mentioned in the said contract with appellee for the alleged consideration of \$3,000, and with appellee's consent took notes aggregating \$2,783 for part of the purchase money, secured by trust deed upon the property, and out of the proceeds in some way arising from said sale paid \$500 to Wagner and Baltes; that on the same date of said sale Denman, with the knowledge and approval of appellee, procured loans aggregating \$9,000 upon the other nine houses and the lots upon which they stood, and out of the proceeds thereof paid to appellee the said sum of \$850.

It was further alleged that Denman is insolvent; that the trust deeds given to secure said \$9,000 have been foreclosed, and that Wagner and Baltes are unable to redeem from the foreclosure sales that have been made of said property.

The prayer of the bill was that appellee be required to account for the said sum of \$850, and that he be decreed to have received said sum in trust for said Wagner and Baltes, and be ordered to pay the same to them.

The chief contention of appellants is that the appellee

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having knowledge of trust relations existing between Wagner and Baltes and Denman, with reference to the property itself, as well as to the proceeds to arise therefrom, whether from a sale or a loan, had no right to accept from Denman in payment of a debt due to him from Denman, funds which he knew had been raised by Denman from a loan upon property which Denman held in trust for Wagner and Baltes; but that having done so, knowing that the money was a trust fund, he must be held as trustee thereof for the appellants.

We have considered all the facts that were alleged, although some material ones may not be embraced within those stated by us, but are unable to discern that they make out a case of trust either implied, constructive or resulting, as between Wagner and Baltes and Denman. *Reed v. Reed*, 135 Ill. 482; *Douglass v. Martin*, 103, 25; *Gibson v. Decius*, 82 Ill. 304; *Taylor v. Turner*, 87 Ill. 296; *Doyle v. Murphy*, 22 Ill. 502; *Bromwell v. Turner*, 37 Ill. App. 561.

Examining the contract, with reference to the above authorities, we can not see that a trust was created.

Denman's contract was to hold the title, for which at that time neither himself nor anybody else had paid anything or agreed to pay anything. In the event that he should sell the houses or borrow money on them, he agreed to pay a certain percentage of what he received, but he does not seem to have bound himself otherwise to pay any sum whatever; and when he should have paid the equivalent of such percentage, no matter from what source he derived the funds, the property or the surplus proceeds would belong to him. His mere agreement to pay such percentage, when realized, created no lien upon the fund to be derived by him, although it well might render him liable at law for the amount.

Testing the transaction by Lord Hardwicke's definition that "a trust is where there is such a confidence between parties that no action at law will lie," (*Sturt v. Mellich*, 2 *Atkyns* 610,) it would seem that no trust existed

here in Denman, for it is plain that an action at law would lie against Denman for any breach of his contract of which he may have been guilty.

Assuming that the demurrer admitted all the allegations of the bill concerning appellee's knowledge of the arrangements between Denman and Wagner and Baltes, yet what those arrangements and agreements were must be found in their written contract and nowhere else.

That contract was under seal, and it is familiar doctrine that parol agreements, whether prior, contemporaneous or subsequent, are, in the absence of fraud, impotent to alter or annul a sealed contract. *Pike v. Leiter*, 26 Ill. App. 530; *Same case*, 127 Ill. 287; *Leavitt v. Stern*, 55 Ill. App. 416.

The contract itself was made a part of the bill, and was attached thereto as an exhibit. The rule is, that allegations in a bill of what is contained in a writing which is made a part of the bill, will be controlled by the writing; that the writing and not what is alleged of it, will control. *Dreyer v. Goldy*, 62 Ill. App. 347.

Appellee must, therefore, be held not to have dealt with Denman, knowing him to have been charged as trustee, but only as being charged with the undertakings or promises found in his written contract with Wagner and Baltes, and which are, as we have said, lacking in all essentials of a trust, and therefore as receiving only that which Denman had a right to bestow and himself a right to receive.

The appellee being subject to no trust relations between other parties, received nothing he was not entitled to. The agreed price for his lots was \$850, which was all that he got. By the terms of the contract he entered into with Denman, the latter had the right to pay him that sum out of the proceeds arising from a sale of the particular property, or from funds derived in any other way, and when paid he was bound to accept it, and to convey his two lots. There was nothing unlawful or inequitable in such a contract, nor, as we think, in the manner of its performance.

It is not claimed that Denman did not have full authority to make the contract with appellee, and it was under that

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contract alone that any right to appellee's two lots and to build upon them was secured by Denman, or any one in whose interest he may have acted.

And there is nothing inconsistent between that contract and the one subsequently entered into by Denman with Wagner and Baltes. Both of those contracts might, so far as we discover, be treated as but one for the working out of a general arrangement, without affecting appellee's right to receive payment for his lots in the way he was paid, or his obligation to convey his property when paid.

Appellee's position was that of a vendor only, upon terms that have been performed both by himself and his vendee. He has not received anything, and by the terms of his contract and all his relations in the transaction, he never was to receive anything but his own. Under such circumstances, to charge him as trustee for others, of that which came to him as his due, would be to make a contract for him which he never contemplated, and which he can not be said to have assumed, under any rule of law with which we are familiar or to which we have been referred.

The decree of the Superior Court will therefore be affirmed, and it is so ordered.

Derby Cycle Co. v. Burton F. White.

1. **INSTRUCTIONS—Assuming Facts, etc.**—In an action for a wrongful discharge, where the defendant pleads the general issue, it is error to instruct the jury that the burden of proof is upon the defendant to show that he was justified in discharging the plaintiff during the term of his employment, as assuming that the defendant did discharge the plaintiff.

2. **WAIVER—In Pleading—General Issue and Plea of Justification.**—Where a defendant pleads the general issue and a plea of justification, the general issue is not thereby waived, nor can the plea of justification be used as evidence of what is denied by the general issue.

Assumpsit, breach of contract, etc. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed May 14, 1896.

CHARLES SHACKLEFORD, attorney for appellant.

The pleas of non-assumpsit and *non est factum*, supported by affidavit, required the plaintiff to make formal proof of the execution of the contract in suit. *Hinton v. Husbands*, 3 Scam. 118; *Shufeldt v. Seymour*, 21 Ill. 526.

Any assumption or intimation from the court as to a material controverted fact is always prejudicial error. *Starr & Crescent Milling Co. v. Thomas*, 27 Ill. App. 141; *Chicago & N. W. Ry. Co. v. Moranda*, 103 Ill. 582.

F. W. BECKER and DALE & FRANCIS, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant for a wrongful discharge from its service. One of the questions of the case, upon which the evidence conflicted, was whether the appellant discharged the appellee, or he quit of his own volition. The appellant put in several useless pleas, one of which justified the discharge. But the general issue, which was the first plea, was not thereby waived, nor could the appellee use the plea of justification as evidence of what the general issue denied. 1 Ch. Pl. 563, Ed. 1844. And it denied the whole case of the appellee. *Ibid.* 478. Yet the court instructed that "the burden of proof is upon the defendant to show that it was justified in discharging plaintiff during the term of employment, provided the jury believe from the evidence, and under these instructions, that the plaintiff's contract was for a definite time, which had not expired at the time of his discharge."

This assumption that the appellant did discharge the appellee was error.

The proposition of the appellee that, to question an adverse erroneous instruction the record must show that it contains all the instructions given, is not supported by authority, nor do instructions given at the request of the appellant, stating that it had the right to discharge the appellee under certain circumstances, excuse the assumption of the disputed fact that it did discharge him.

The judgment is reversed and the cause remanded.

Keeley Brewing Co. v. Emrick.

Keeley Brewing Co. v. George Emrick.

64	247
66	535
64	247
80	353

1. **ULTRA VIRES**—*What is Not.*—The renting of a place to sell beer is not in excess of the powers of a corporation organized for the business of brewing, manufacturing, buying and selling lager beer and malt.

2. **ESTOPPEL**—*When Not Allowed to Prevail.*—The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail when it will defeat the ends of justice or work a legal wrong.

Action for Rent.—Appeal from the County Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

PATRICK McHUGH, attorney for appellant.

WALTHER & LANAGHEN, attorneys for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This suit, begun before a justice of the peace and appealed to the Circuit Court, where the judgment here involved was rendered, was brought by the appellee against the appellant to recover an installment of rent for the month of July, 1895, under a written lease made by appellee to appellant of the first or store floor of No. 7601 Cottage Grove avenue, to be occupied for a saloon and living rooms.

The lease was dated May 1, 1893, and was for a term of five years, at a gross rental of \$3,540, payable in monthly installments.

It was proved that the appellant took possession of the premises about the time the lease was executed and that it paid the rent for two years and one month, and up to July, 1895.

For that period the appellant, either through its agents or sub-tenants, occupied and enjoyed the benefit of the leased premises, but from thenceforward vacated and apparently abandoned the premises. The defense is that the contract of lease was *ultra vires* the appellant.

Appellant's charter describes the object to be "the business of brewing, manufacturing, buying and selling lager beer and malt."

It was shown that the business that was carried on in the premises was that of a saloon, and it was shown that the appellant's manufacturing plant was at 28th street and the lake, and that the saloon in question was not necessary to its business.

While, as we have heretofore said (Nat. Br'g Co. v. Ahlgren, *post*), we do not think the renting of premises to be used as a place to sell beer was in excess of the powers of a corporation organized for purposes like the objects of appellant, we may here, as we did there, place our decision upon the ground of estoppel.

Appellant is estopped from setting up its lack of power to make such a contract, when after having made it, it entered into possession under it and partook of the benefits conferred by it. What we said in National Brewing Company v. Ahlgren (No. 6189 this term), in this connection, is applicable here, and we refer to that opinion for our reasons and authorities.

If there be any serious contention that the execution of the lease by the appellant was not sufficiently proved, it is fully met by a reference to the statute, section 62, chap. 78, Rev. Stat. (Hurd's Ed. 1895), entitled "Justices," which prohibits such a defense except the denial of execution be made by the affidavit of the party denying the execution of the instrument.

See also Sec. 34, chap. 110, entitled "Practice;" and N. W. Br'g Co. v. Manion, 44 Ill. App. 424.

The cause was tried by the court without a jury, and the propositions of law which appellant submitted to the court upon the theory that the lease was *ultra vires* and void as to the appellant, and that it was not the deed of appellant, were properly refused.

The judgment of the Circuit Court is accordingly affirmed.

Augustus Newell v. Christ Rahn, Adm.

1. NEGLIGENCE—Must be Shown.—Where the evidence fails to show that the injury was the result of the defendant's negligence there can be no recovery.

Trespass on the Case.—Death from negligence. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Reversed. Opinion filed May 14, 1896.

STEPHEN G. SWISHER and F. H. GANSBERGEN, attorneys for appellant.

CASE & HOGAN, attorneys for appellee; ANDREW J. HIRSCHL, of counsel.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action brought by the administrator of the estate of a deceased person to recover damages for the death of such person, produced, as alleged, by the negligence of the appellant.

The deceased was fifteen years old when the accident occurred, and had worked for appellant for sixteen months, in his organ factory.

On the day that the deceased received the injuries from which he shortly died he worked at a small planing machine, which he fed with boards about three feet long, one inch thick, and from four and a quarter to seven and a quarter inches wide. That machine seems to have been operated by two belts, one known as the driving belt, which operated the planer proper, and the other a shorter belt known as the feed belt, which operated the feeder. The driving belt descended to the machine from a pulley near the ceiling of the room, and the feed belt, which was only about seven feet in full length, reached from one pulley to another, both upon different parts of the machine as an entirety.

No witness saw the deceased at the moment of the accident, and it is matter of conjecture only as to just how it happened.

The theory of the appellee is that while the deceased was at his work and in the exercise of due care for his safety, the feed belt flew off and hit him the blow that caused his death.

As we read the evidence, this theory is not supported by the facts.

The feed belt, it is true, was off and lying upon the floor not far from the body of the deceased, when, the moment after a crack like a sharp report was heard, which attracted the attention of other workmen, the deceased was first seen injured and lying upon the floor.

There were only two witnesses, one for the appellee and one for the appellant, who saw the deceased and the belt a sufficiently short time before the accident to be able to testify concerning the situation in a manner at all helpful to an elucidation of the real fact of how the accident occurred.

The witness Josephson, for the appellee, testified upon direct examination that when the deceased got hurt there was a noise; that he looked around and then ran up to where the deceased was lying; that he did not see the deceased working at the machine "just before he got hurt, before I (the witness) heard the noise. The machine stopped, and then I looked out of the window, and when I was looking there I heard the noise, and I looked around and he was lying there."

Q. "About how many minutes was that in between?"
A. "About one or two."

Upon cross-examination this witness testified that when the deceased was at work feeding the machine he stood upon its south side, and that he, the witness, stood on the opposite side of the machine taking out the boards.

The witness was then asked concerning the belt, and the questions and his answers were as follows:

"Q. Did it hurt anybody when it came off? A. Not that I know of.

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Q. Were you there when it came off? A. Yes, sir.

Q. You didn't see anybody hurt there by that belt? A. No, sir.

Q. After the belt came off it stopped the machine? A. Yes, sir.

Q. You walked over to the window and looked out? A. Yes, sir.

Q. Do you know where William Rahn was standing when you went to the window? A. He was standing in the same place that I went round.

Q. That is here (indicating), this feeding place? A. Yes, sir.

Q. Then when you looked around you heard a crash? A. Yes, sir.

Q. When you looked around where did you see William Rahn? A. He was lying on the east side of the machine, a little north.

Q. A little north of the east side of the machine? A. Yes, sir."

It would therefore appear that by appellee's own witness it was proved that the belt in question had come off before the witness had gone to the window, and before the deceased was hurt.

But if there were any doubt about it, there can, we think, be none when we consider, also, the testimony of the witness Phillips, for the appellant. He was working at a machine known as a jointer, a few feet removed from the planer, and testified that he saw the deceased a few seconds before the accident happened. He was questioned, and answered as follows:

"Q. Do you know what he was doing there? A. When I seen him?

Q. Yes. A. He had a stick in his hand, and was playing with that belt that runs up, when I seen him.

Q. What do you call that belt that runs up? A. That is the driving belt.

Q. How long was that before the accident took place? A. Only a few seconds.

Q. What was the position of your body toward him? Was your back to him or was your face to him? A. When I saw him doing that I was facing him.

Q. Describe to the jury what he was doing. Was the machine running? A. The machine was running at that time. He got a stick and was touching it up.

Q. Was the lower belt there, the feed belt, on? A. The lower belt was off.

Q. The lower part of the machine, then, was not running? A. The feed part.

Q. You say he was tapping? A. Yes.

Q. What was he tapping with? A. He had got a board, or stick, I call it, somewhere between two and three inches wide, and was tapping it as it was running.

Q. Let me ask you if this stick (exhibiting a stick) is anything like the stick that he had? A. It is similar to that. It might have been a little bit—not quite so wide probably; I didn't measure it. That is similar to the stick.

Q. Now, can you show the jury about how he was tapping that belt when you saw him? A. A hitting the belt this way, and tapping it up; the driving belt, that was running when I seen him. I turned around, and when I turned around he was doing that. When I turned around and had my face to him, he put the stick down like that, and he stood in a position looking down on the floor. The belt was on the floor; the little belt.

Q. That is, this side belt here? A. Yes; that is the feed belt. I turned around to go to my work again, and that was the last I seen him before he was hurt. My attention was called by hearing a crack; about two seconds, two or three seconds, I can't say exactly; it was a very few seconds, I turned around to my machine; of course my back was to him at that time, then, and I heard this crack like you take a stick and crack it, or anything like that—a very sharp report—and I looked around, and he was laying to the north, on the east side of the machine, on his back.

Q. Do you know how he was injured? A. No, sir.

Q. Do you know where that feed belt was lying when

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he was injured? A. It was laying down pretty near the same position as it is now, underneath the driving belt pulley."

Cross-examination by Mr. Hogan:

"I testified before the coroner. I don't quite remember whether I spoke anything about tapping the belt with a stick.

Q. Don't you know that you testified before the coroner that he was looking toward the planer? A. No, I testified that he was looking down toward the belt, to the best of my recollection.

Q. You recollect it then better than you do now, didn't you? A. Well, that is what I understood; at least that is what I believe that I testified, that he was looking down, looking down at the belt or looking down toward it.

Q. Then in about a second you heard a fall or crack? A. A second or two, or three; I couldn't say exactly.

Q. Don't you know that you testified before the coroner that you thought he was trying to put the belt on? A. They asked me an opinion, if I could form an opinion how it was done, I believe, and I said I could not, unless he was trying to put on, or—well, unless he was trying. I believe I testified that."

Such is all the evidence, aside from the proved fact that the same belt had flown off about a week before, unless it be in the character of the blow inflicted upon the deceased, from which can be gathered any information as to how the accident occurred.

The visible hurt that deceased received is described as, "on the side of his head, on the right side of the temple. It was a closed wound, with the exception that it was bruised. It was about the size of a hand."

Such an injury could have, as it seems to us, as well been inflicted by a wide stick, such as the witness Phillips testified to seeing deceased use in "playing with" or "tapping up" the driving belt, as by being struck with a heavy leather belt.

The intimation contained in the last answer of the last witness, that the deceased might have been struck when he

was trying to put the belt on, does not aid the plaintiff's case for it was proved that he had been instructed never to try to put on a belt if it came off, and that in any case of the machinery getting out of order, to report the fact to the foreman, who would attend to it.

With the feed belt off, the feeding part of the machine would stop, while the planer itself would continue to run by force of the driving belt. It was the stopping of the feeder that set the deceased, who fed it, and the witness Josephson, who took away the boards from the other part of the machine, at liberty. Whether in the interval that followed, the deceased was injured by the stick he had in his hand catching in the driving belt that continued to run, or in some other way, we can not say; but it is plain enough that he was not hurt by the feed belt coming off, or by any negligence of the defendant, or by any means which resulted from the performance of any duty by the deceased.

Considering all the evidence, we see no ground for a recovery by the appellee, and we therefore reverse the judgment without remanding the cause.

J. F. Brady v. George Horvath.

1. **ASSUMPSIT—When it Lies for Money Had and Received.**—The action of assumpsit for money had and received is an equitable action, and will lie wherever one party has obtained money which, in equity and good conscience, he ought not to retain.

Assumpsit, for money had and received. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEEDLY, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

JOHNSON & McDANNOLD, attorneys for plaintiff in error.

J. F. DILLON, attorney for defendant in error.

Brady v. Horvath.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The declaration in this case consisted of the common counts, in assumpsit, including those for money had and received and upon an account stated.

A promissory note, dated April 25, 1895, made in the name of M. Ottens & Co., and payable July 25, 1895, to the order of appellee for \$1,500, was introduced in evidence by the appellee, who testified that the appellant signed and gave it to him on or about the day of its date.

There was evidence that tended to show that the appellant received for the appellee, in some transaction which is not made plain, the sum of \$2,000, and that when the money was demanded of appellant, he excused himself by saying he had paid it out or most of it, and could give appellee at that time \$250; that appellant then paid to appellee said sum of \$250 in cash, and for the balance gave him a check or promissory note for another \$250, which was subsequently paid, and also gave to him said promissory note for \$1,500.

The appellee testified that he saw appellant sign the name of M. Ottens & Co. to the note at the time it was given to him. Another witness for appellee testified that after the note fell due and was not paid, he went with appellee to see appellant and remonstrated with appellant for not giving the money to appellee, and said to him, "You gave him a promissory note;" and that appellant replied, "Well, I would like to see him get the money;" but that two days later appellant gave him \$25 for the appellee, saying "Here is \$25, and you will get the balance in a short time."

The appellant on the other hand testified that the signature to the note was not his; that he did not write the name; that no one was authorized to write it for him, and that he did not know who wrote it. If the truth of his having signed the note were of controlling effect in the case, one way or the other, we should be obliged to rely upon the verdict of the jury as settling the question, for, in view of all the evidence, we think the evidence may fairly be said

to preponderate in favor of the jury's conclusion that he did sign it.

But regardless of the fact of who signed the note, the evidence tended strongly to show that the appellant received the \$2,000 for the appellee, and the appellant himself does not deny it. He only denied any and all transactions with appellee, but we think his testimony was fairly overborne by the other evidence.

Of the money so received by the appellant, we must regard the verdict of the jury as settling that \$500 was paid by appellant to appellee, as testified by the appellee, and that there remained in the hands of the appellant the sum of \$1,500, which of right, and equitably, belonged to the appellee, and for which the verdict was rendered.

The action of assumpsit for money had and received is an equitable action, and will lie wherever one party has obtained money which in equity and good conscience he ought not to retain. Supervisors, etc., v. Manny, 56 Ill. 160; Barnes v. Johnson, 84 Ill. 95.

It is not necessary to discuss the several assignments of error. So far as the right to urge them, considering the condition of the record, is concerned, they are not well taken. The real merits of the case are all involved in what we have specially mentioned, and having been settled in appellee's favor, the judgment of the Circuit Court must be affirmed, and it is so ordered. Affirmed.

Ellen Higgins and Daniel Higgins v. Andrew Peterson.

1. WRIT OF ASSISTANCE—*When to be Issued.*—Under a decree of foreclosure providing that upon the execution and delivery of the deed by the master the grantee or grantees, his or their heirs or assigns, be let into possession of the premises, and that any of the parties who may be in possession and any person who since the commencement of the suit shall have come into possession under them, or either of them, on the service of a copy of the master's deed, shall surrender possession thereof,

Higgins v. Peterson.

and in default of so doing a writ of assistance may issue upon a showing of the conditions provided in the decree, the parties are, upon notice, entitled to the writ.

2. *PARTIES—Bound to Take Notice.*—Parties to a foreclosure suit are bound to take notice of all that is done therein.

3. *OBITER DICTUM—Not the Law of the Case.*—What is said in a case must be taken with reference to the matters concerning which the opinion is written. It is not what the court by way of illustration or explanation may say in its opinion that constitutes the law of the case, but that which is necessarily decided by the judgment.

Petition for a Writ of Assistance.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

STATEMENT OF THE CASE.

This is an appeal from a decree of the Circuit Court of Cook County granting a writ of assistance. Andrew Peterson and George P. Bay obtained a decree of foreclosure on a trust deed executed by appellants. Andrew Peterson became the purchaser at the master's sale, and no redemption being had, obtained a master's deed to the premises described in the trust deed, and afterward a writ of assistance was issued to put him in possession of the premises described in said trust deed.

The only error assigned is the issuance of the writ of assistance by the Circuit Court; in support of this assignment of error the two considerations urged are:

First. It was error to award a writ of assistance for the reason that a copy of the decree of sale was not served upon the defendants, or either of them.

Second. It was error to award a writ of assistance against the appellant, Ellen Higgins, for the reason that there was no personal service on her of the notice of application for such a writ, and no service on her of a copy of the decree, either personally or otherwise.

P. O'NEIL BYRNE, attorney for appellants.

JOHNSON & McDANNOLD, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellants, being parties to the foreclosure suit, were bound to take notice of all done therein. It was therefore unnecessary to serve them with a copy of the decree. The decree in this cause contains the following :

“ And it is further ordered, adjudged and decreed that upon the execution and delivery of the deed or deeds as aforesaid, the grantee or grantees, his or their heirs or assigns, be let into possession of the portion of said premises so conveyed, and that any of the parties to this cause who may be in possession of said premises or any part thereof, and any person who, since the commencement of this suit, shall have come into possession under them, or either of them, on the service of a copy of said master’s deed, surrender possession thereof to such grantee or grantees, his or their heirs or assigns; and, in default of so doing, that a writ of assistance may issue in accordance with the practice of this court.”

The petition of Andrew Peterson, one of the complainants herein, sets up that on November 26, 1892, a decree of sale of the premises in controversy was entered, and on December 28, 1892, a certificate of sale was issued to the petitioner by the master in chancery, and that on March 31, 1894, a deed of conveyance by said master, of said premises, was delivered to the petitioner and duly recorded; that said deed was exhibited to said Ellen Higgins a short time after recording of same, and a copy of said deed heretofore served on both of said defendants; that defendants are in possession of the premises and refuse to surrender the same; and prays for a writ of assistance to put petitioner in possession of the said premises.

The record shows that Ellen Higgins had notice of such petition and appeared and resisted the issuance of the writ of assistance.

Upon such showing, in accordance with the decree, appellee was, upon notice, entitled to a writ of assistance. *Kershaw v. Thompson et al.*, 4 Johnson Ch. 609; Oglesby

Shields v. Brown.

v. Pearce, 68 Ill. 220; Harding v. LeMoyne et al., 114 Ill. 65-76; Ency. of Pl. & Pr., Vol. 2, p. 982.

In Oglesby v. Pearce, *supra*, as well as in O'Brien v. Fry, 82 Ill. 87, the original decree did not require the defendants to surrender the possession or provide for putting the holder of the master's deed in possession. What is said in those, as in all other cases, must be taken with reference to the matters concerning which the opinions were written.

It is not what the court, by way of illustration or explanation, may say in its opinion, that constitutes the law of the case, but that which is necessarily decided by the judgment.

The order of the Circuit Court is affirmed.

Edward Shields et al. v. John Brown.

1. **APPELLATE COURT PRACTICE.**—An abstract must, as against the appellant, be sufficiently full to present all the errors upon which he relies.

Trial on a Transcript from a Justice of the Peace.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

JAS. C. COONEY, attorney for appellants.

SIMEON AEMSTRONG, attorney for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The merits of this appeal are presented to us upon an abstract, the whole of which, omitting the title to the cause and the name of appellants' attorney, is as follows:

“ABSTRACT OF RECORD.

Page of
Record.

1 Placita.
2 Bond.

64	259
64	379
64	259
67	279
64	259
78	627
78	629
78	672
64	259
80	391
64	259
86	202
88	551
64	259
109	426

- 3-6 Petition for certiorari.
- 8-13 Transcript of justice.
- 14 Order of court quashing writ of certiorari on motion of plaintiff.
- 15 Stipulation.
- 17 Bill of exceptions.
- 19 Appeal bond to Appellate Court.
- 21 Certificate of clerk.
- 23 Assignment of errors.
 - 1st. The court erred in quashing the writ.
 - 2d. The court erred in finding in favor of plaintiff on motion to quash.
 - 3d. The court erred in not finding in favor of defendants.
 - 4th. The court erred in sustaining the motion to quash.
 - 5th. The court erred in not overruling motion quashed."

The practice is thoroughly settled that no cause can be reversed upon such an abstract. It is not a compliance with the rules of the court, and utterly fails to intelligibly present any portion of the record upon which error is claimed. An abstract must, as against the appellant, be sufficiently full to present all errors upon which he relies. Everything on which error is assigned must appear in the abstract.

For the authorities, we refer to Johnson v. Bantock, 38 Ill. 111; C., P. & St. L. Ry. Co. v. Wolf, 137 Ill. 360; Strohm v. People, 160 Ill. 582; City Electric Co. v. Jones, 161 Ill. 47; Poppers v. Perkins, 61 Ill. App. 250; South Side R. T. R. Co. v. Lackman, 62 Ill. App. 437; Farson v. Hutchins, 62 Ill. App. 439, and Schmidt v. Devine, 63 Ill. App. 289.

In his brief the appellant argues :

"The petition contains all the requirements of the statute. * * *

"The matters set out in the petition in this cause amount to a valid, legal and binding obligation entered into by the parties litigant based upon a sufficient consideration."

And yet, as we have seen, he does not furnish in his

Ricardi Apartment House Co. v. Beaudet.

abstract a word of the petition, nor does he do so in his brief. This illustrates more fully than any argument could do, the defectiveness of the abstract.

For want of a sufficient abstract, the judgment of the Circuit Court is affirmed.

Ricardi Apartment House Co. et al. v. George E. Beaudet.

1. **EQUITY PRACTICE—*Finding of Facts.***—A conclusion of fact, not objected to before the master or followed by exceptions, is the end of the controversy upon such facts, and if made upon conflicting testimony, is as conclusive as a verdict, even if objected and excepted to.

2. **CONTRACTS—*Inability to Perform.***—The inability of a contractor to perform, is no legal excuse for not performing his contract.

Petition for a Mechanic's Lien.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1896. Reversed and the petition dismissed. Opinion filed May 14, 1896.

JOSIAH BURNHAM and JAMES L. CLARK, attorneys for appellants.

ELA, GROVER & GRAVES, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is a petition for a mechanic's lien by a sub-contractor against the owner of the building, if there be one, the original contractor, and three other appellants, on the allegation that these three had or claimed some interest in the premises.

The petition does not show that any building was ever erected, much less that the original contractor ever had anything due to it (a corporation) from the House company.

The master reported that the appellee did some excava-

tion and built some walls, and did no more, and then was "unable to proceed with his contract;" and the context shows that such inability resulted from want of means to pay his workmen. Also that the architect and original contractor "were justified in reletting the contract." The appellee excepted to this last conclusion of the master, but not to the first, and the court sustained that exception. The case stands, then, upon the master's report and the decree, thus: The fact, as the master reports it, is, that the appellee could not perform his contract, and, as a legal consequence, that the original contractor was justified in reletting the work. The appellee did not object to the master's conclusion of fact, but to that of law, and the court concurred with him.

It is true that the master also concluded that the appellee was "entitled upon an accounting to recover the amount fairly due for the work done by him in said contract," which must have been in his mind, not a conclusion of fact, but of some sort of fireside equity.

Now, a conclusion of fact, not objected to before the master (*Pennell v. Lamar Ins. Co.*, 73 Ill. 305), followed by exceptions in the Circuit Court (*Owen v. Occidental B. & L. Ass'n*, 55 Ill. App. 347), is the end of controversy on that fact, and, if made upon conflicting testimony, is as conclusive as a verdict, even if it be objected and excepted to. *Whitcomb v. Duell*, 54 Ill. App. 650; *Friedman v. Schoengen*, 59 Ill. App. 376; *Foster v. Swaback*, 58 Ill. App. 581.

The decree directs a "sale of the said building and leasehold interest."

The petition had not mentioned any building, nor was there in the petition anything from which an inference or even a conjecture could be made that there was any leasehold interest. The first mention of it is in the master's report, as "a leasehold interest * * * for a term of years." The decree directs that if there should be a deficiency of proceeds, the appellee shall have an execution for it against all the appellants, three of whom had no concern with the business, being made parties only on the allegation that they had or claimed some interest.

Sutter v. Rose.

It is quite safe to say that this decree never underwent the scrutiny of the chancellor himself, having been entered, as the record shows, with this suffix: "O. K. as to form. — Sol'r for def'ts."

This O. K. does not waive substantial rights. It doubtless was intended as an acknowledgment that if the appellee was entitled to the relief that the decree gave, then the form was not objectionable.

Now with the fact, as shown by this record, that the appellee had, according to his own account, done less than a twelfth part of his contract, and in materials and pay to his workmen, had been compensated for nearly two-thirds of that, and then with the master's finding standing as a fact that the appellee "was unable to proceed with his contract," how is he entitled to anything?

His inability is no legal excuse for not performing his contract. *Leopold v. Salkey*, 89 Ill. 412.

The language of the decree, that all exceptions inconsistent with the findings of the decree are overruled, has no application to a finding of fact by the master which was not excepted to, whether such finding was consistent with the decree or not. On this record the petition should have been dismissed.

The decree is reversed and the petition dismissed at appellee's cost, without prejudice to any remedy the appellee may have at law.

Adolph Sutter v. Lester E. Rose.64 263
169 66

1. **FRAUDULENT CONTRACT—Must be Disaffirmed upon Discovery of the Fraud.**—A party to a fraudulent contract, who claims to have been defrauded, must disaffirm the contract at the earliest practicable moment after having discovered the fraud. If he remains silent, and continues to treat property acquired under it as his own, he will be held to have waived the objection, and will be conclusively bound by the contract.

Assumpsit, on an assumption clause contained in a deed. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

KNIGHT & BROWN, attorneys for appellant, contended that a party is not chargeable with knowledge of a fraud committed upon him at the time that he had the opportunity of discovering the fraud, but from the time that he did actually have knowledge of the fraud. 1 Bigelow on Frauds, 30, 436, 523; 1 Keener, Selections on Contracts, 603; Kirkland v. Lot, 2 Scam. 18; Lloyd v. Higbee, 25 Ill. 494; Devine v. Edwards, 87 Ill. 177; Linington v. Strong, 107 Ill. 295; Jones v. Lloyd, 117 Ill. 597; Greenwood v. Fenn, 136 Ill. 146; Strong v. Linington, 8 Brad. 436; Morey v. Pierce, 14 Brad. 91; Byers v. Daugherty et al., 40 Ind. 198; Metzger v. Huntington, 139 Ind. 301.

In the case of agency, where one who is admitted to be the agent of another for some purpose exceeds his authority and attempts to bind his principal, while the rule ought certainly to be much more stringent than in cases of a fraud perpetrated upon the principal, the principal can only be held to have ratified the unauthorized act of his agent after full knowledge of the fact—not after he has had the opportunity of discovering the fact. Metzger v. Huntington, 139 Ind. 301; Cadwell v. Meek, 17 Ill. 227; G. C. & S. R. R. Co. v. Kelly, 77 Ill. 473; Kerr v. Sharp, 83 Ill. 203; Reynolds v. Ferree, 86 Ill. 576; McDermid v. Cotton, 2 Ill. App. 302; McGoeck v. Hooker, 11 Ill. App. 656; Meister v. C. D. Co., 11 Ill. App. 229; McCormick v. Nichols, 19 Ill. App. 333; Davies v. Atkinson, 25 Ill. App. 272; Bensly v. Brockway, 27 Ill. App. 410.

E. H. THOMPSON and G. B. ANDREWS, attorneys for appellee.

Acceptance by the grantee of a deed poll has the same effect as to him as if he had executed the instrument. Thompson v. Dearborn, 107 Ill. 87, 93; Dean, for use, etc., v. Walker, 107 Ill. 540, 544; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35.

Therefore, the acceptance of a deed being shown, it would seem to follow that a presumption of knowledge of its contents by the grantee would be raised the same as in the case of any other writing signed by a party thereto; and, in the absence of fraud or circumvention, this presumption amounts to an estoppel. *Wharton's Evidence*, Sec. 1243; *McKenzie v. Hesketh*, L. R., 7 Ch. Div. 675; *Bigelow on Fraud* (1st Ed.), 73; *Wheeler & Wilson Mfg. Co. v. Long*, 8 Ill. App. 463, 466; *Strong v. Linington*, 8 Ill. App. 436.

In order to constitute fraud or circumvention which will defeat a written instrument, some trick, artifice or misrepresentation, sufficient to throw a person of ordinary prudence off his guard, must be used, by which the party is induced to execute an instrument materially different from the one intended. *Hendrix v. The People*, 9 Ill. App. 42; *Strong v. Linington*, 8 Ill. App. 436; *Leach v. Nichols*, 55 Ill. 274.

And this with intent to deceive. *Linington v. Strong*, 111 Ill. 152.

It is a necessary ingredient of fraud that some means must be used to deceive or circumvent. *Walker v. Hough*, 59 Ill. 375; *Fauntleroy v. Wilcox*, 80 Ill. 477; *St. Louis & South-eastern Ry. Co. v. Rice*, 85 Ill. 406.

Misrepresentation or ignorance of the mere legal effect is not enough. *Hendrix v. The People*, 9 Ill. App. 47; *Fry v. Day*, 97 Ind. 348; *Hardy v. Brier*, 91 Ind. 91.

It is the duty of the party signing to ascertain the contents before execution. He should not be negligent. *Wheeler & Wilson Mfg. Co. v. Long*, 8 Ill. App. 463; *Miller v. Powers*, 119 Ind. 79; *Bigelow on Fraud* (1st Ed.), 78; 8 Am. & Eng. Enc. Law, 643.

To entitle a theory of the case to recognition in the instructions to the jury, such theory must have a substantial basis in the evidence, which must be more than enough to merely raise a guess, possibility or conjecture. The evidence on which such theory is based must be strong enough to support a finding by the jury. 2 *Thompson on Trials*, Secs. 2315, 2317; 11 Am. & Eng. Enc. Law, 252; *Trustees, etc., v. Hepley*, 28 Ill. App. 629; *Simmons v. Chicago &*

Tomah R. R. Co., 110 Ill. 340; The People v. The People's Insurance Exchange, 126 Ill. 468.

A party desiring to have a particular theory of the case submitted to the jury, should present it to the court in apt instructions, or at least request the court at the time to instruct thereon. *Plaut v. Young*, 38 Ill. App. 102; *Duncan v. The People*, 134 Ill. 118; 2 Thompson on Trials, Sec. 2346.

A contract induced by fraud is not void but merely voidable. 1 Beach Mod. Eq. Jurisprudence, Sec. 82, p. 85; *Greenwood v. Fenn*, 136 Ill. 146.

A party induced to contract by fraud has his election to affirm or disaffirm the agreement; but if he would disaffirm, he must do so at the earliest practicable moment after discovery of the fraud. *Day v. Ft. Scott Investment Co.*, 153 Ill. 304; *Greenwood v. Fenn et al.*, 136 Ill. 158; *Morey v. Pierce*, 14 Ill. App. 91; *Perry v. Pierson*, 135 Ill. 218; *Hall v. Fullerton*, 69 Ill. 448; *Strong v. Strong*, 102 N. Y. 69; 5 N. E. Rep. 799; *Grymes v. Sanders*, 93 U. S. 55; 2 Pomeroy's Eq. Juris., Sec. 897; 1 Beach Mod. Eq. Juris., Sec. 76.

There is but one election to rescind or affirm, and once exercised, is at an end. *Bigelow on Fraud* (1st Ed.), 436; *Greenwood v. Fenn*, 136 Ill. 146.

The party will not be permitted to speculate for a time on the probabilities of an advantageous bargain, after he has discovered a cause for rescission, but must act promptly to compel it. *Neal v. Reynolds*, 38 Kan. 432; *Greenwood v. Fenn*, 136 Ill. 146.

And a party discovering fraud can not lie by until he discovers its full extent before acting. A further discovery of fraud will not give a further election to rescind. *Greenwood v. Fenn*, 136 Ill. 146.

And rescission must be *in toto*, if at all, so that all parties may be restored to their original rights. 1 Beach Mod. Eq. Juris., Sec. 76; 8 Am. and Eng. Encyc. Law, 651, n. 6.

Negligence by a defrauded party, when knowledge is ascertainable by use of ordinary diligence, will estop him as against innocent persons who rely upon his apparent acquiescence. 2 Beach Mod. Eq. Juris., Sec. 1100; *Leather Mfr. Nat. Bank v. Morgan*, 117 U. S. 96.

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A contract of purchase of mortgaged premises, provided that the conveyance should be made "subject" to the mortgage, merely, is not of itself evidence of fraud by the grantor in inserting in the deed an agreement, binding the grantee to pay the mortgage indebtedness. *Weaver v. McKay et al.*, 108 Cal. 546; 41 Pac. Rep. 450.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a suit in assumpsit brought by appellee against appellant upon an assumption clause contained in a certain deed made by one Charles H. Peckham and wife to the appellant, conveying certain lots in the city of Wichita, Kansas, dated May 27, 1890, for an expressed consideration of \$3,005.

That clause followed the covenants of general warranty, and expressed an exception thereto, and was as follows:

"Except a mortgage to secure a note for \$1,600, dated April 5, 1889, with interest at eight per cent per annum, due on or before three years from date, which the grantee assumes and agrees to pay."

There is no question but the note and mortgage referred to in said clause belonged to the appellee, and remained wholly unpaid.

The firm of Sutter Brothers, of Chicago, held a claim then in suit against Peckham, who seems to have lived in Wichita, and the deed containing said clause was executed and delivered in purported settlement of said claim.

It was proved that the consideration named in the deed was made up of the amount due on the mortgage and the sum of Peckham's indebtedness to Sutter Brothers.

The main contention of the appellant is, that he never agreed to accept a deed from Peckham by which he should assume the note and mortgage, and that the execution of the deed in the manner indicated was a fraud upon him. He does not contend that he did not agree to accept a conveyance of the property subject to the mortgage, in satisfaction of the indebtedness of Peckham to Sutter Brothers,

nor that the deed did not come into his possession soon after it was made.

We think the evidence fairly showed what appellant contends was the fact, and that the deed was accepted by the attorneys for Sutter Brothers in the form that it was drawn without authority to do so.

But it is still more clearly established that appellant was charged with notice that the deed did contain the clause in question, and having such notice, that he did nothing to disaffirm the contract imposed upon him by the deed.

The deed was sent to appellant by his attorneys, in Kansas, either directly or through R. G. Dun & Co., and came to his hands in the summer of 1890, shortly after it was recorded. He testified that he put it away in the vault without reading it, and kept it from that time forward without objection, and did not know of the clause in question being in the deed until in 1892, when this suit was commenced, and that up to that time he did not know the legal effect of the clause as applied to himself.

Appellant admits that he personally wrote the following letter, which bears date nearly two years after the deed came into his possession, and about ten months before this suit was begun :

"SUTTER BROS.,
LEAF TOBACCO,
155 and 157 Lake Street, Cor. La Salle St.
June 13, 1892.

Ratliff & Cone, Wichita, Kas.

GENTLEMEN: In reply to yours of the 11th, would say that we had a claim against C. H. Peckham, formerly of your city, which we sent to R. G. Dun & Co. for collection. Mr. Peckham made their attorney a proposition to take the land you inquire about in settlement of our claim, subject to a mortgage, we think, of about \$1,600. The attorney settled the claim as above, but instead of taking a second mortgage, he took a deed of the property in the name of Adolph Sutter, for the firm of Sutter Bros., which was not according to our intentions, as we did not wish to assume

Sutter v. Rose.

any mortgage on this property and would not pay the mortgage at the present time. However, if you can get a chance to sell the property, we are willing to sell our portion of it at a reasonable price, so let us know by return mail what the best offer is that you can get, and if it is all satisfactory we would be willing to close out our interest in the land.

We have no agent in Wichita, except R. G. Dun & Co.'s attorney, who did the business for us, but whose name we do not remember at present. However, if you should want to know his name and address, let us know and we will find same out from R. G. Dun & Co. of this city. Let us hear from you as soon as possible, as to what the prospects are for disposing of the property, and oblige

Yours very truly,

A. S.

SUTTER BROS."

It would seem to be conclusive that at the time he wrote that letter he knew of the assumption clause in the deed; and that he knew somewhat of its legal effect is certain from the language he used.

The most that can be said is, that he may not have understood the full legal effect upon himself of the clause in the deed.

Taking no steps and doing nothing from that time on to disaffirm the contract so assumed by him, even though a fraud had been practiced upon him of which he had, previous thereto, no knowledge, he must be estopped from setting up the fraud as against appellee.

There is not the slightest evidence to show that appellee had any knowledge of the fraud claimed by appellant, but on the other hand it was shown that appellee changed his position with reference to the mortgaged premises from that of holder of the title by deed (though in fact a mortgage) to the less advantageous position of a direct mortgagee, for the purpose, as we must conclude under the circumstances, of facilitating the settlement between Peckham and appellant's firm.

It is well established that a party to a fraudulent contract,

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who claims to have been defrauded, must disaffirm the contract at the earliest practicable moment after having discovered the fraud, and that, if he remains silent and continues to treat the property as his own, he will be held to have waived the objection and will be as conclusively bound by the contract as if the fraud had not occurred. *Morey v. Pierce*, 14 Ill. App. 91; *Greenwood v. Fenn et al.*, 136 Ill. 146; *Day v. Fort Scott Investment Co.*, 153 Ill. 293; *Lington v. Strong*, 97 Ill. 295; same case, 8 Ill. App. 436.

Although appellant was defrauded, yet, knowing it, his subsequent conduct was such as requires that he should be held to have elected to waive the fraud and stand by the contract.

His letter we regard as plainly conclusive against him in that respect, and we think it was not error to refuse to permit the appellant to explain that his intention was other than was therein expressed.

Appellant, in his brief, expressly waives discussion of any error in the refusal of instructions offered by himself, but contends that there was error in those given in behalf of appellee.

The given instructions presented the case upon the theory of law already mentioned as applicable to the proved facts and circumstances, and we think correctly so.

We think that under the law applied to the evidence, the judgment was correct, and it will therefore be affirmed.

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Chicago Economic Fuel Gas Company v. John Myers.

1. **PERSONAL INJURIES—Inquiry as to Owner and Contractor—Liability.**—Although the owner may make a contract which in form gives to the contractor entire control over the work, still the circumstances surrounding the transaction may be inquired into for the purpose of determining if the owner had actually surrendered all control and did not exercise any discretion.

Trespass on the Case, for personal injuries. Appeal from the Superior

Chicago Economic Fuel Gas Co. v. Myers.

Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

WILLIAM B. KEEP, attorney for appellant.

JAMES MAHER, attorney for appellee; A. W. BROWNE, of counsel.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action to recover for personal injuries said to have been received by appellee through the negligence of appellant.

That appellee was severely burned while working at the laying of gas mains, which were being placed in the streets of Chicago for appellant, was undisputed.

That appellee believed that he was, when injured, working for appellant, is evident, and that he had good reason to so think, is apparent.

Appellee was injured either through the negligence of appellant or of a certain construction company engaged by it to lay gas mains in Chicago. The president of the appellant company was the chief engineer of the construction company; the two companies were closely related; their offices were in the same building. The president of one, who was the chief engineer of the other, testified that he was unable to tell in which capacity he ordered the gas turned into the main leading to the North Division of the city, in which the accident occurred.

Several persons working with appellee when he was injured, testified that they understood that they were working for appellant; that they were so told by their foreman. The president of appellant seems to have been, to some extent, overseeing the laying of these mains, and to have, in some instances, given orders to workmen. That appellant had, in the doing of this work, so completely turned it over to the construction company that it alone was in possession and control of the mains and solely responsible for neg-

ligence in the work of putting them down, we do not think was shown. Gas was passing through the mains; the construction company had, so far as appears, no use for this gas; it would seem, therefore, that appellant was in possession of the mains and making use of them.

By themselves the mains were not unsafe, but the passage of gas through them, while appellee and others were working at them, was fraught with danger.

We do not think it was necessary that appellee should have alleged in his declaration that he was, when injured, in the employment of appellant. Such allegation would not have increased the measure of diligence required of either appellant or appellee.

The declaration was upon its face sufficient, and was not vitiated by the evidence that appellee was injured through the negligence of appellant while working for it.

It may be that it was the gas of another company which ignited and injured appellee, but the president of appellant, four days prior to the injury, ordered its gas turned into the mains upon which appellee worked; such president seems to have known that the mains were filled with gas; unusual care was therefore required. Appellee was ordered to a dangerous place; the immediate order was given by a person who is said to have been an employe of the construction company only. Whomever the foreman who ordered appellee to the place in which he was burned was actually employed by, apparently he was working for the company that owned the mains, for whose benefit they were being laid, whose gas was passing through them, and whose president was chief engineer of the work.

Appellant was entitled to have the jury instructed as to the law in reference to the exemption of owners from liability for the negligence of contractors, to whom has been given entire control of the manner and mode of performance of work by them being done.

While we do not entirely approve of the instructions given upon this subject, yet we do not think that appellant was entitled to have the instructions it asked given without

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modification. Although the owner may make a contract which in form gives to the contractor entire control over the work, still the circumstances surrounding the transaction may be inquired into, that the court may see if the owner actually had surrendered all control and did not exercise any direction. Thompson on Negligence, Vol. 2, p. 907; Pickard v. Smith, 4 Law Times N. S. 470.

The accident under consideration would not have happened had gas not been turned into the pipes. Appellant should have known—did know—that the pipes were full of gas; and so knowing, the president of appellant can not be so separated from the chief engineer of the construction company as to absolve appellant from liability for the negligence of what a servant of one did in obedience to directions of him who was the agent of each.

The damages seem large, but are not so excessive as to shock our sense of right, or clearly indicate passion or prejudice. The amount has the sanction of the trial judge, and we do not feel warranted in reversing his conclusion.

The judgment of the Superior Court is affirmed.

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W. S. Cantrell, George W. Fithian and Thomas Gahan,
composing the Railroad and Warehouse Commission
of the State of Illinois,
v. George A. Seaverns.

Same v. South Chicago Elevator Company.

Same v. Chicago Elevator Company.

Same v. Central Elevator Company.

Same v. Santa Fe Elevator and Dock Company.

Same v. Edson Keith.

Same v. Chicago and Pacific Elevator Company.

1. RAILROAD AND WAREHOUSE COMMISSION—*Acts of, Reviewable.*—The Railroad and Warehouse Commission, if having jurisdiction to inquire whether warehousemen have been guilty of violating the laws con-

cerning the business of public warehousemen, can not insist that what particular acts or conduct it may hold to be violative of such laws is in the exercise of its jurisdiction and not reviewable.

2. SAME—*Findings of, not Conclusive—Reviewable on Certiorari.*—The Railroad and Warehouse Commission has jurisdiction to inquire whether certain acts of public warehousemen are in violation of the laws concerning the business of such warehousemen, but its action is not conclusive. It may be reviewed on certiorari.

3. JURISDICTION—*Of Special and Limited Tribunals.*—A tribunal of special and limited authority exercising judicial, or *quasi* judicial, powers can act only upon subjects shown upon the face of its proceedings to be within that authority, and no presumptions in favor of its jurisdiction will be presumed.

Certiorari, to review the action of the Railroad and Warehouse Commission. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

H. J. HAMLIN, J. B. MANN and HENRY S. ROBBINS, attorneys for appellants.

J. R. CUSTER and JAMES E. MUNROE, attorneys for appellees.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellants compose what the statute calls the "Railroad and Warehouse" Commission.

The appellees are public warehousemen of class A, under a license granted by the Circuit Court in pursuance of the provisions of the act to regulate public warehouses of April 25, 1871.

Under the authority which the appellants claimed to be conferred upon them by section 12 of the act of April 13, 1871, to establish a board of railroad and warehouse commissioners, they canceled and revoked the license of the appellee. We will assume (though the appellee argues that a repeal by implication had taken it away) that they have authority to cancel and revoke a license when, upon a hearing, it appears that the "warehouseman has been guilty of

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violating any law of this State concerning the business of public warehousemen."

The Circuit Court issued a certiorari to bring up the proceedings of the commission on canceling and revoking the license. Both sides agree that the office of such certiorari so far as touches this case, was only to inquire whether the commission had jurisdiction of the proceeding before them.

But the appellants insist that having jurisdiction to inquire whether the warehousemen had been guilty, etc., then what particular acts or conduct they might hold to be "violating any law of this State," etc., was in the exercise of jurisdiction, and not reviewable. That is a very far-reaching position. Corrupt and designing men on the commission would hold the warehousemen at their mercy. No court of original jurisdiction has such absolute authority, nor have the appellate courts, in a large part of the business before them.

The distinction between the want of jurisdiction, and error in its exercise, is the subject of a multitude of irreconcilable decisions, which we shall not attempt to review. It is everywhere agreed that a tribunal of special and limited authority, exercising judicial, or *quasi* judicial, powers, can act only upon subjects shown upon the face of the proceedings to be within that authority; that no presumptions in favor of jurisdiction are to be indulged. The brief of the appellants admits that proposition to be true. I do not find that the doctrine has ever in this State been, in express terms, applied to tribunals other than inferior courts; as to which it has been often repeated.

A very considerable collection of cases relating to special authority conferred upon other tribunals may be found in New Jersey *R. R. v. Suydam*, 17 N. J. Law 25.

Recurring now to the position of the appellants, that having jurisdiction to inquire, etc., the result which they reached upon that inquiry is conclusive, it has been several times held in this State to the contrary. Concede that if the acts charged upon the appellee were such as, if committed, would be "violating the law of this State concerning the business

of public warehousemen," and that if a hearing was had upon the charges, the determination by the appellants that the evidence proved the charges, would be conclusive (Young v. Lorrain, 11 Ill. 624), yet the question remains whether their determination that certain specified acts were "violating," etc., is also conclusive.

A court of chancery has jurisdiction of all matters cognizable in chancery, and of the persons before it; yet a bill presenting a case wholly out of the authority of the court to grant relief upon, does not confer jurisdiction to make orders, disobedience of which is contempt. Weigley v. People, 51 Ill. App. 51; same case, title reversed, 155 Ill. 491.

So while a court of probate may revoke letters of administration for statutory causes, yet if done for other cause, the revocation is void. Munroe v. People, 102 Ill. 406.

The County Court has authority, when an assignment for the benefit of creditors has been made, to compel the assignee to bring it in, and act under it, or give place to another who will act. Farwell v. Cohen, 138 Ill. 216.

But "the making of the assignment must precede the exercise of jurisdiction," and in First Nat. Bk. v. North Wis. Lumber Co., 41 Ill. App. 383, we innocently assumed that if the County Court "decided that such an assignment had been thus made, and that therefore it has jurisdiction, when the fact is the other way, its further action to enforce what it wrongly held to be such an assignment, is without jurisdiction."

This was *obiter*, but as we still think, true.

Now the specific acts charged against the appellee and found by the appellants to be truly charged, were that the appellee did "buy, sell, own, and deal in grain stored in" his warehouse, and did "mix the grain owned by him in" his warehouse "with the grain of other persons stored therein."

The appellants do not claim that by such acts any statute of this State is violated, but only that public policy is offended; and their brief makes many valuable suggestions as to the modes by which warehousemen may profit at the

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expense of their customers. Whether such modes are practicable, we do not consider, being of the opinion that the legislature meant by the words "any law of this State concerning the business of public warehousemen" such laws as were laws of this State only by statutes enacted in this State. The appellants do not need, in the discharge of their duties, Coke and Blackstone, Kent and Story, but the Revised Statutes of Illinois.

The judgment of the Circuit Court in quashing the proceedings of the appellants is affirmed.

Herman Eilenberger v. John L. Nelson.

1. **PLEADING—*Sufficient Declaration.***—A declaration in an action for personal injuries which fails to establish a connection between the negligence charged and the injury of which the plaintiff complains is defective as stating no cause of action.

TRESPASS ON THE CASE, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed May 14, 1896.

SIGMUND ZEISLER, attorney for appellant.

WALKEE, JUDD & HAWLEY, attorneys for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.
It is assigned for error, and the assignment is relied upon and especially urged in argument, that the declaration does not state a cause of action.

The action was in case, to recover for a personal injury suffered by the appellee through the negligence of the appellant while he, the appellee, was lawfully engaged in his business connected with the building of a certain house, the carpenter work of which was being constructed by the appellant.

As shown by the abstract, the material part of the declaration was as follows:

"Avers that on August 15, 1891, defendants were engaged in doing carpenter work on a certain building, * * * and by their employes were engaged in laying and causing to be laid a certain hardwood floor in one of the rooms of said house; in said floor there were left 'certain holes or openings' in which it was intended to place registers for heating purposes; while thus engaged it was customary for the defendants and their employes to cover the floor with paper, so as to protect the same against damage. It was the duty of the defendants and their employes, in case they laid paper over said register holes, thus hiding the same, to cover said holes with boards or some other covering, either above or below such paper. 'Yet the said defendants, wholly unmindful of their duty in this behalf, carelessly and negligently, through their then and there servants and employes, covered up one of said register holes in said room with paper, thus hiding the same, but leaving the same wholly unprotected and without any other covering, by means of which said premises the said plaintiff, who was then and there in said room and said building, attending to certain business connected with the building of said house, while using due care and diligence for his own safety, stepped upon the paper covering one of said register holes, and broke through the same and fell, and was then and there hurt,' and suffered various injuries."

It will be observed that it was alleged there were certain holes or openings in the floor, and that it was the duty of defendant in case they laid paper over the same, whereby the holes became hidden, to cover the holes so hidden with boards either above or below the paper, yet that, neglectful of his duty, the defendant covered one of said holes with paper, thus hiding the same, but leaving the same otherwise unprotected and uncovered, by means whereof the plaintiff stepped upon the paper covering one of said holes and broke through the same and fell, and was hurt.

The allegation that it was customary to cover the floor

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with paper must, under the rules that require pleadings to be construed most strongly against the pleader, be treated as an allegation that it was customary to cover the entire floor with paper, and what follows, as an allegation that the floor and all the openings in the floor were covered with paper, and that all but one of the holes were protected.

It is not alleged that the plaintiff fell into the hole that was not protected. The allegation is that he stepped upon the paper covering one of said holes, and broke through the same.

Whether the paper so stepped upon was above boards, which it was the duty of the defendant to place there for protection, or whether there were any boards there or not, is not alleged.

Non constat boards were underneath the paper, and then another question would have arisen, as to whether they were sufficient to excuse the defendant. The defendant was only liable for negligence, and it would have been a question of fact whether the boards he had placed over the hole in question were of a kind that would afford him a defense.

The allegation that one of the holes was covered with paper, but left unprotected by boards or other suitable protection, without any allegation that that was the hole into which the plaintiff broke, should be disregarded. It was immaterial how many holes were unprotected, unless it were into one of such that the plaintiff fell and became hurt.

It is quite consistent with the declaration that the hole into which plaintiff broke was one that had been protected and that the injury was not because of the negligence of the defendant.

Whether, if protected, it were so imperfectly done as to render the defendant liable, should have been alleged, and if not protected, it should have been alleged that it was into the unprotected hole that plaintiff fell.

We can not look to the facts that were proved under a declaration, which, on its face, does not state a cause of

action. C., M. & St. P. Ry. Co. v. Hoyt, 50 Ill. App. 583; C. & E. I. R. R. Co. v. Hines, 132 Ill. 161.

If, as contended by appellee, the facts made out a case, he should have amended his declaration to fit his proof.

We see no escape from reversing the judgment, because, simply, of the failure of the declaration to state a cause of action.

Reversed and remanded.

Stephen Matthews v. The People's Fire Ins. Co. et al.

1. **TRESPASS—*By Agents of Corporations.***—Where an action is brought against an insurance company for trespasses committed by its agents, the burden of proof is upon the plaintiff to show that the company authorized, countenanced or ratified the acts of the agent.

Trespass, to personal property. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

STATEMENT OF THE CASE.

This was an action of trespass.

In July, 1889, Stephen Matthews had a tailor shop and store at 202 La Salle street, Chicago; his stock and fixtures were worth about \$7,000. On this stock he had three insurance policies, originally for \$2,000 each, one in the People's Insurance Company, of New York, one in the Rochester German Insurance Company, of Rochester, New York, and the other in the St. Paul Fire and Marine Insurance Company, of St. Paul. These policies were all issued to Stephen Matthews through A. Loeb & Son, sole agent for said companies in Chicago.

On Sunday, July 28, 1889, a fire occurred in the store. On the following Monday steps were taken to ascertain the loss and adjust the same, Matthews selecting William Reed for his adjuster, and Mr. Solomon being selected as the ad-

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juster for the companies by A. Loeb & Son, agent of the companies.

There was delay in adjusting the loss and no business was transacted at the store up to the Friday noon following the fire. Matthews, Reed, Solomon and others were back and forth in the store negotiating in regard to the loss, etc., Solomon acting for the companies during that time. Mr. Matthews had possession of the store as theretofore. On Friday following the fire, about noon, Matthews and his son, John, left the store to get their lunch, the son propping the doors from the inside on account of the lock having been broken at the time of the fire, and crawling out through the transom, after having propped the doors. When Matthews and his son returned from lunch they found the doors open, and a man from the Fire Insurance Patrol in charge of the store.

Mr. Matthews, the plaintiff, inquired of the man what he was doing there, and he stated that he was a fire patrolman, and was sent there by the captain of the fire patrol. Matthews then went to Captain Shepherd, chief of the fire patrol, and inquired of him by whose authority he opened the place and took possession, to which, Matthews and Reed state, Captain Shepherd replied, "The companies' agent, Mr. Solomon, told me to go there and take possession." Matthews then went back to his store and found the fire patrolman still there; he followed Matthews around and told him that he must not lay hands on anything, and Matthews says he was not able to put this man out, but it does not appear that he made any attempt to put or get the man out.

Matthews then went to Solomon, the adjuster for the insurance companies, and also to Mr. Loeb, the agent, and says he could get no satisfaction from either; that he asked Solomon for the stock, and he would give no answer; that he asked Mr. Loeb for the fixtures, some three weeks afterward, and was ordered out of his shop; that he (Matthews) saw Mr. Solomon several times afterward, but could get no satisfaction. Matthews states that Solomon told him that

he had authorized Shepherd to do as he, Shepherd, had done.

Reed, the adjuster for Matthews, testifies that he asked Solomon by what authority he ordered the fire patrol to break open Matthews' store, and that he said: "That is my business. We have insurance on that stock."

Matthews never took possession of the store afterward, nor got any of his goods back, and made no attempt to do so other than the questioning above set forth. Matthews says that neither of the companies offered to "return" his stock or fixtures; what became of the same does not appear.

PRENTISS, HALL & GREGG, attorneys for appellant.

PADDICK, WRIGHT & BILLINGS, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant failed to show that any of the defendants authorized, countenanced, or ratified the entrance or stay of the patrol in appellant's premises; on the contrary, appellant's witness, the superintendent of the patrol, testified that he of his own motion put a man in the store.

Chapter 142 of the Revised Statutes, "An Act to enable boards of underwriters incorporated by or under the laws of the State of Illinois to establish and maintain a fire patrol," approved March 28, 1874, in force July 1, 1874, in its first section provides: "That boards of underwriters incorporated by or under the laws of the State of Illinois, shall have power to provide suitable rooms for the accommodation of a fire patrol and also to provide a patrol of men and a competent person to act as superintendent to discover and prevent fires, with suitable apparatus to save and preserve property and life at and after a fire; and the better to enable them so to act with promptness and efficiency, full power is given such superintendent and such patrol to enter any building on fire, or which may be exposed or in danger of taking fire from other burning buildings, subject to the control of the

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fire marshal of the city, and at once proceed to protect and endeavor to save the property therein and to remove such property, or any part thereof, from the ruins after the fire."

Plaintiff seems to have made no earnest effort to get the fire insurance patrol out of his store; nor is it evident that he desired so to do. He seems merely to have asked the adjuster for, and an agent of, one of the companies, why the patrol had placed a man in his store, and getting, as he says, no satisfaction, abandoned his store, fixtures and stock.

The judgment of the Circuit Court is affirmed.

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Supreme Lodge Knights and Ladies of Honor v. Julia
Portingall and George W. Portingall by
Mary O'Brien, their next friend.

1. **PARTIES—*In Actions Under Beneficiary Certificates.***—Under a beneficiary certificate payable to children, naming them (three in number), upon the death of the mother, right of action accrues to the three children to sue jointly for the money, and one of the children dying, the action must be in the names of the survivors, whether the ultimate right to the money be with them or not. An executor or administrator of the deceased can not be joined nor sue alone for the share of his deceased.

2. **INTEREST—*On Contracts Entered into Prior to the Act of 1891.***—The act of 1891, reducing the rate of interest from six to five per cent, does not affect contracts entered into prior to the time the act went into effect.

Assumpsit, on a beneficiary certificate. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

ASHCRAFT, GORDON & COX, attorneys for appellant, contended that an action at law can not be maintained by an heir upon a chose in action. Hickox v. Frank, 102 Ill. 66; Neubrech v. Santmeyer, 50 Ill. 74; Citizens Nat. Bank v.

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Dayton, 116 Ill. 262; Makepeace v. Moore, 5 Gilman 474; Dwight v. Newell, 15 Ill. 333; S. & C. Stat., Vol. 2, 879; McLean Co. Coal Co. v. Long, 91 Ill. 619; Leamon et al. v. McCubbin et al., 82 Ill. 263; People, etc., v. Brooks, 123 Ill. 246; 2 Williams on Executors, 863.

FRANCIS T. COLBY, attorney for appellees.

Where one of several infant joint owners of personal estate dies leaving no debts, and leaving the surviving infants his only heirs at law, and no administrator of his estate is appointed, the estate vests immediately in the survivors, and an action may be maintained in their names for its recovery. Lynch v. Rotan, 39 Ill. 15; McCleary v. Menke, 109 Ill. 294.

Where the heirs at law of an intestate whose debts have been paid receive his personal estate, his subsequently appointed administrator will not be permitted to recover or interfere with the estate. The People, use, etc., v. Abbott et al., 10 Ill. App. 64; McCleary v. Menke, 109 Ill. 294.

That a minor prosecutes a suit by next friend raises no presumption that there is no guardian. A minor having a guardian may still prosecute suit by next friend appointed for that purpose. R. S. Ill., Chap. 64, Sec. 18.

Creditors shall be allowed to receive at the rate of five per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument in writing. R. S. Ill., Chap. 74, Sec. 2.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The declaration is assumpsit upon a beneficiary certificate for \$1,000 issued to Julia Portingall January 4, 1888, "which sum shall at her death be paid to children John S. Portingall, Julia Portingall, Geo. W. Portingall."

Julia, the mother, died October 26, 1889. John S. died August 28, 1892. No money has been paid.

The only question is, may these appellants recover \$1,000? When the mother died a right of action accrued to the

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three children, on which the three could only sue jointly; neither alone for a third. Am. Cent. R. R. v. Miles, 52 Ill. 174.

And one dying, the action must be in the names of the survivors, whether the ultimate right to the money be with them or not. An executor or administrator of the deceased can not be joined; nor sue alone for the share of the deceased. 1 Ch. Pl., 11th Ed., 1828.

Whether the appellees have had a guardian to whom the money might have been safely paid, does not appear on this record, and no question can be made here on the assumption that there was no such guardian. By what arithmetic the counsel has found that the time from October 28, 1889, to January 25, 1896, was five years, one month, seven days, does not appear; in fact, as the contract was not affected by the statute of 1891 reducing the rate of interest from six per cent to five (Fireman's Fund Ins. Co. v. Western Refrigerating Co., 58 Ill. App. 329) the \$310 allowed as interest is quite too little; but no cross-errors are assigned, nor did the appellees take any step in the Circuit Court to correct the error. The judgment is affirmed.

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George M. Welty v. H. R. Jacobs and Ulysses D. Newell.

1. **SPECIFIC PERFORMANCE—*When a Court of Equity Will Not Decree.***—A court of equity will not entertain a bill for specific performance of a contract, when it is manifest that before a hearing can be had, the time for performance, which is the essence of the contract, will have expired.

2. **INJUNCTIONS—*Will Not Issue to Restrain a Party from Refusing to Perform a Contract.***—A court of equity has power to restrain a party from interfering with the performance of a contract, but it can not restrain him from refusing to perform it; for such refusal the remedy is at law.

Bill for an Injunction.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

STATEMENT OF THE CASE.

This is an appeal from the decree of the Superior Court of Cook County, Illinois, dismissing the bill of complaint on the ground that the complainant had an adequate remedy at law.

On the 28th day of December, 1895, the complainant filed his bill of complaint in the Superior Court of Cook County, setting up that he was a theatrical manager, and that on the 9th day of April, 1895, he entered into a contract with H. R. Jacobs, manager, representing M. J. Jacobs, proprietor of the Alhambra Theater in the city of Chicago. The contract provides that Welty shall play his company, known as "The Black Crook" company, at the Alhambra Theater for seven consecutive nights, with usual matinees, commencing with matinee of December 29, 1895, he on his part, agreeing to furnish a company of first class artists, together with special scenery necessary for the play, all perishable properties, calcium lights when required, extra ballet and supers, and to deliver to the party of the first part ten days in advance, prepaid and free from all charges, certain advertising material specified.

Jacobs, on his part, was to furnish the house well cleaned, lighted and heated, together with stock scenery and equipments contained in the house, nine men for stage hands, regular ushers, gas man, property man, janitor, ticket sellers, door keepers, orchestra, house programmes and license, bill boards, bill posting, distribution of litho's and other printing, and the usual newspaper advertisements, and resources of the theater in stage furniture and properties not perishable.

The gross receipts were to be divided between the parties, Welty receiving sixty per cent and Jacobs forty.

The contract further provides that should the attraction or any part of the company not prove satisfactory to Jacobs, or the company or attraction is not as represented to him or his agent at the time of making said contract, then Jacobs should have the right to cancel this contract by giving Welty one week's written notice.

The bill of complaint further alleges that the complain-

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ant has kept and fully performed all the covenants and agreements on his part; that Jacobs did not claim or pretend that the attraction or any of complainant's company was not satisfactory to him, nor that the company or attraction was not as represented to him at the time of making said contract, but does wrongfully and fraudulently pretend and claim, and state to complainant, that since the making of said contract and within the last three days, he had entered into an arrangement with Ulysses D. Newell to lease to him the Alhambra Theater and appurtenances during the same period of time provided in the contract with complainant; that he claims and pretends that the said Newell informed him that if he did not cancel the contract with the complainant, and lease said theatre and appurtenances to him, said Newell, for the said period, that he would and could obtain Havlin's Theater for the period immediately preceding the period mentioned in said contract, and thus destroy the profitable production of said play at the Alhambra Theater during the period mentioned in said contract. The bill charges such pretenses and statements to be wholly colorable excuses for the breaking of the contract.

The bill further sets forth that complainant has a company of forty performers under contract; that he will be obliged to pay their salaries whether they perform or not, and will be compelled to remain idle during the period mentioned in said contract; that his performers will become dissatisfied and seek other positions on account of the difficulty between complainant and said Jacobs, and he will suffer in his reputation as a theatrical manager; that he had been to considerable expense in producing the necessary printing tendered to Jacobs for the production of the play, and at large expense in transporting his company to Chicago, and making necessary preparations; that the monetary value of his contract for the use and occupation of said Alhambra Theater and its appurtenances can not be determined either actually or approximately in any other manner than by carrying out and fully performing the contract according to its terms and conditions; that Jacobs and Newell have announced their intention of preventing

complainant from carrying out said contract and of depriving him of the gains and profits he would otherwise make by keeping complainant out of the possession and use of said theater; that Jacobs and Newell are both financially irresponsible.

Bill prays for an injunction enjoining the defendants from in any manner hindering or preventing complainant or his company from taking possession of said Alhambra Theater, its appurtenances, equipments and stage properties as mentioned and provided in the contract between complainant and Jacobs, on December 29, 1895, and from in any manner hindering, delaying, interfering with or preventing complainant from producing the play known as "The Black Crook" at the Alhambra Theater for the seven successive nights, with usual matinees, commencing with the matinee of December 29, 1895, or from doing any act or acts, now or hereafter, during the period from December 29, 1895, to January 4, 1896, inclusive, to interfere with, hinder, prevent or molest complainant in the use, occupation or enjoyment of the said Alhambra Theater and its appurtenances, stock scenery, equipments and stage property, or in the production of the said play by complainant at the said theater during said period, and from using or occupying the said Alhambra Theater, its stage, stock scenery, equipments or properties or any part thereof, during the period from December 29, 1895, to January 4, 1896, inclusive, and from allowing, permitting or consenting to any other person or company using, occupying the same or any part thereof, during said period, and that Jacobs be enjoined from refusing to furnish complainant during the period aforesaid, the necessary light, heat, music, regular stage hands, stage carpenters, flymen, ushers, gas man, property man, janitor, ticket sellers and door keepers, and other employees and equipments, in accordance with the terms of said contract.

An injunction was issued at the time the bill was filed, and on the same day was served on the defendants, H. R. Jacobs and Ulysses D. Newell.

On January 3d, both Jacobs and Newell filed their answers to the bill of complaint, and claimed the complainant

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had a complete remedy at law. The defendant, Newell, by his answer claimed to be an innocent party, having contracted with Jacobs on the supposition that the Welty contract was canceled. He also claimed that the bill is without equity, and prays the same advantage as though he had demurred to the bill.

Replication was immediately filed to said answers, and the court, by consent of the complainant and defendants, H. R. Jacobs and U. D. Newell, heard the cause on its merits, together with the motion of the said defendants to dissolve the injunction.

The court, by that decree, finds that the injunction was violated by the defendants, H. R. Jacobs and Ulysses D. Newell.

The court further found, however, that the equities of said cause were with the said defendants, and that the complainant had a complete and adequate remedy at law, and therefore that the said injunction was improvidently issued.

It was therefore decreed that the injunction be dissolved and the bill dismissed.

From which order an appeal was prayed and allowed to this court.

BULKLEY, GRAY & MORE, attorneys for appellant.

JAMES E. PURNELL, attorney for appellee Jacobs.

PARTRIDGE & PARTRIDGE, attorneys for appellee Newell.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The only remedy that a court of equity could give the complainant that might not be given by a court of law, would be to direct a specific performance of the contract, and to forbid the defendant to allow any one, save the complainant, to use the theater during the period from December 29th to January 4th, inclusive.

The court could not compel a complete specific performance. It could not compel the defendant to supply "stage

hands, flymen, regular ushers, property men, janitor, ticket seller, door-keepers, orchestra," although it might mulct the defendant in damages for not supplying such help. The distinction between restraining one from interfering and restraining a party from refusing to furnish, is obvious.

The contract contemplated that the defendant Jacobs should supply the regular help belonging to his theater. Such help might refuse to work, and could not be compelled to. *Am. Live Stock Com. Co. v. Chicago Live Stock Exch.*, 41 Ill. App. 149; *Kennicott v. Leavitt*, 37 Ill. App. 437.

It was impossible for the defendants to be brought into court, and this cause heard, before the time for the execution of the contract would have been at an end. The performance was to begin December 29th and end January 4th. The bill was filed December 28th; the defendants could not be compelled to answer the bill until after January 14th. The law is such that ere a hearing could have been had the contract would have expired. It was for this reason, also, impossible for the court to compel a specific performance of the contract. A court of equity ought not to entertain a bill for specific performance of a contract when it is manifest that before a hearing can be had, the time for performance, it being of the essence of the agreement, will have expired. *Hovannian v. Bedessern*, 63 Ill. App. 353; *Pomeroy's Eq.*, Sec. 1405.

The injunction granted was too broad, and as granted could not have been enforced. The defendant Jacobs could not, by an injunction restraining him from refusing to furnish to the complainant the usual and necessary "light, heat, music, regular stage hands, stage carpenter, flymen, ushers, gas man, property men and equipment in accordance with the terms of said contract," have been compelled to supply such men and equipments.

If the defendant Jacobs refused to carry out his agreement, the complainant had an adequate remedy at law, while under the circumstances a court of equity could not give anything save money damages.

The decree of the Superior Court, dismissing the bill, is affirmed.

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William Kolze v. Thomas R. Jones.

1. **WAIVER**—*Of a Refusal to Instruct the Jury to Find for the Defendant.*—When at the close of the plaintiff's testimony the defendant requested the court to instruct the jury to find for him, the court refused, and he excepted, but followed his exception by the introduction of testimony, he waived his exception to the refusal of the court to grant his request.

Trespass, quare clausum fregit. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

JAMES MAHER, attorney for appellant; A. W. BROWNE, of counsel.

C. A. SURINE, attorney for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

There was testimony on the trial that in 1874 or 1875, one Jacob Koski and his wife went upon the premises in controversy and remained until his death, two or three years later; that the widow remained, and the appellee married her and moved in, in 1878; that after a time—not fixed—she wanted a divorce, and gave the appellee a quit-claim deed to let her off easy; that she married again, and the appellee leased the premises to the new husband and wife to remain for four or five years, but they had not taken possession, and it does not appear when the lease took, or was to take, effect; that the appellee raised a crop on the premises every year; that he occasionally and often slept there.

The case was tried by a jury, without instructions, and the fact that there was counter testimony, not conclusive, raises no question here.

At the close of the appellee's testimony, the appellant asked the court to instruct the jury to find for him, but waived that request by following his exception to the refusal

of it, with the testimony of witnesses before the jury. *Kinsley v. International Military Encampment Co.*, 41 Ill. App. 257, is but one of many cases so holding; *L. S. & M. S. Ry. v. Richards*, 152 Ill. 59.

There is no reason why the judgment against the appellant for tearing down and carrying away the fence from and filling the well upon the premises should be disturbed, and it is affirmed.

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Bernard Dulle v. Margaret Lally.

1. *WAIVER—Effect of Obtaining Leave to Plead After Default.*—Where a defendant in an action at law has been defaulted and judgment entered against him in consequence thereof, by applying for and obtaining leave to plead, and by pleading to the merits of the cause and going to trial upon his plea, he waives all errors intervening prior to the obtaining of such leave.

2. *PRACTICE—Motion for Leave to File a Plea of the Statute of Limitations.*—It is not error to refuse leave to the defendant to file a plea of the statute of limitations after the plaintiff has closed his case in a proceeding where a judgment has been entered by default, and the defendant having obtained leave to plead to the merits, the court is merely proceeding to ascertain the merits of the judgment.

3. *SAME—Pleading After Judgment by Default.*—Where a judgment has been entered by default and the defendant is granted leave to plead to the merits of the case, the better practice is to let the judgment stand and the lien of the same be preserved to the plaintiff, so that he may be entitled to interest during the time that his judgment is stayed.

Assumpsit, for labor and services. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

JOHN P. McDOWELL and RUFUS COPE, attorneys for appellant.

EDWARD J. WALSH, attorney for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This suit in assumpsit, for labor and services performed

Dulle v. Lally.

during a period of about twenty years, ending in 1885, was begun in January, 1888, by the appellee and one John Lally, against the appellant, personally, and in his capacity as administrator of his deceased wife, Sarah Ann Dulle.

A general demurrer to the declaration, which consisted solely of the common counts, was interposed and was on May 1, 1889, overruled, and the defendant was ordered to plead forthwith. By the same order which overruled the demurrer and ruled the defendant to plead, the defendant was defaulted for want of a plea, and leave was given to the plaintiffs to amend the declaration by discontinuing the suit as to John Lally as co-plaintiff, and as to the defendant in his capacity as administrator; whereupon a jury was called, who assessed plaintiff's damages at \$2,213.33, and judgment for that amount was entered upon the verdict, and an amended declaration in conformity to the leave that was given was at the same time filed.

At the same term, and on May 4, 1889, the defendant moved to set aside the verdict and judgment, and subsequently, on December 20, 1890, upon his motion, it was ordered that leave be given him to plead to the action, "the judgment to stand." Thereupon the defendant pleaded the general issue.

Afterward, and on September 16, 1895, the cause was again submitted to a jury upon evidence on both sides, and a verdict for \$1,950 was rendered.

Upon the hearing of a motion for a new trial the plaintiff remitted the sum of \$263.33 from the amount of the original judgment rendered May 1, 1889, and it was thereupon ordered that the balance of said judgment, being the sum of \$1,950 (the amount of the second verdict), "stand in as full force and effect as at the time of the rendition thereof, and that the plaintiff have execution," etc.

This appeal calls in question certain alleged errors in the rendition of the original judgment of May 1, 1889, as well as concerning the last judgment.

Concerning all errors which are alleged to have occurred in the rendition of the original judgment, and which may

be briefly summarized as having arisen because of the default and judgment in favor of but one of the plaintiffs against the defendant in his individual capacity alone, whereas the original declaration was by two against the defendant in a dual capacity, personal and representative, and because there was no rule upon defendant to plead to the amended declaration, and no default on that declaration, we must regard them all as having been waived by the defendant by obtaining leave to plead and by pleading to the merits of the cause, and going to trial upon his plea.

As to the errors that are argued with reference to the admission and rejection of evidence upon the last trial, we discover nothing that demands place in the opinion, and content ourselves with merely saying that there does not appear to have been any material error therein.

On the question that the court erred in not allowing the appellant to file a plea of the statute of limitations, we agree with the trial court, that the request so to be permitted coming after the appellee had substantially closed her case was too late.

There is, however, another view to be taken of the matter of the offer to file that kind of a plea. It is in its nature a plea that does not go to the merits of the cause of action. A judgment had already been recovered against the appellant, and was still in force. The trial then proceeding was to ascertain what the merits of that judgment were. There is no rule of law or practice that requires a court to set aside a judgment that has been lawfully rendered, except where it is made to appear that justice will be defeated if it be not done; and even if under ordinary circumstances the plea of the statute of limitations should have been permitted to be interposed under the exercise of a judicial discretion, yet when, as here, the object of this second trial was to discover if the actual merits of the case required the vacation of that former judgment, we do not think such a plea should have received any favor.

The remaining question is one of much more moment, and is, so far as we are informed, one that has not been the

Dulle v. Lally.

subject of authoritative decision. It is whether, upon the second verdict for \$1,950, which was a less sum than the first verdict upon which the former judgment for \$2,213.33 was rendered, it was proper to order that the former judgment should stand for the amount of the second verdict as of the date of the former judgment.

In other words, had the court the power by its judgment to give effect to the verdict as of a day several years prior to the date of its rendition, and so cast upon the defendant an additional burden of several hundred dollars, by way of interest, more than the jury found?

Perhaps the court's action in that regard can only be sustained by considering what was the object and effect of the order of December 22, 1890, whereby the defendant was let in to plead.

The true construction of that order, which, as the record shows, was entered upon the motion of defendant, was, as we think, that he, the defendant, should have leave to plead upon condition that the judgment might stand as security and in every respect be effectual against him except as to enforcing it, until, and unless, he should show upon a trial of his plea that no judgment should have been recovered against him, or that the judgment was for too much, and if for too much that then it should be abated to the extent that it was too great.

The order was: "On motion of defendant's attorney, it is ordered that leave be and is hereby given the defendant to plead herein within ten days from this date, the judgment to stand."

The order is not as definite as it might be, nor as it should be, if we consider the frequent instances in which like orders are granted in this county, but it should, nevertheless, be given such a construction as will make it what it was manifestly intended to be.

The defendant was a suppliant for favor from the court; what he asked for and obtained was not a matter of right. In granting him the favor, the court must be understood as giving it upon conditions of as little hardship as possible to

the plaintiff. And it must therefore be considered that the court intended in yielding the favor to defendant that he might plead, to give him further right, without which that to plead would be valueless, to have the question of how much, if anything, he owed, submitted to a jury; and that as to the plaintiff the judgment should remain, subject only to be abated to the extent that the defendant should be able to substantiate his defense to the case that the plaintiff might make against him upon such a submission to a jury.

Such being, as we understand, the true construction of the order, the effect to be given to the last verdict for \$1,950 was exactly that which was given. The original judgment was, by the *remittitur* that was entered, reduced or abated down to the sum which the jury found was owing, and thereby the defendant received the full benefit of the favor granted him by permitting him to plead and show that the judgment was for too much.

We do not see how the defendant could ask for more.

We are impressed with the importance of our holding as affecting the practice in the courts of this county in like cases, which, as we understand, is somewhat variant, some doing as was done in this case, and others pursuing the practice of setting aside the old judgment and entering a new judgment upon the last finding; but the difference in the practice may arise from a different kind of order, under which a defendant has been let in to plead.

We conclude, however, although not without hesitation, that it is more just that the old judgment should be allowed to stand, and the lien which may have thereby been obtained preserved to the plaintiff, as well as that the plaintiff should thereby be given interest during the time that his judgment has been stayed. The proceeding to thus let in a defendant to plead upon terms, partakes very much of the nature of an equitable interposition on behalf of a defendant, and we think should be somewhat controlled by equitable considerations. (Since this opinion was prepared, we have seen *Hall v. First Nat'l Bank*, 133 Ill. 234, where, on page 244, the principle we have spoken of seems to be approved.)

Harbert v. Mershon.

The facts of the case, although peculiar in some respects, were decided adversely to the appellant by the jury, upon what seems to be a clear preponderance against him, which facts, within established rules, are not reviewable upon appeal, but must be treated as finally settled in favor of the appellee.

Discovering no sufficient error in the record to justify a reversal of the judgment, it will be affirmed.

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Charles H. Harbert v. Stephen L. Mershon et al.

1. **EQUITY PRACTICE—Dismissal of the Bill upon the Filing of a Sworn Answer.**—A complainant filed a judgment creditor's bill calling upon the defendants to answer under oath, which they did, denying every allegation of the bill upon which the complainants could have any relief, upon which the court dismissed the bill for want of jurisdiction to proceed further. Held proper, under the authority of Addyston Pipe and Steel Company v. City of Chicago, Legal News, April 4, 1896, p. 256.

Creditor's Bill.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANECKY, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

HARBERT & DALEY, attorneys for appellant, contended that this court has so definitely decided the point at issue that it would be useless to enter into any extended argument upon the question of law involved. It is true that a bill of discovery, properly so-called, under the early chancery practice, had become exhausted as soon as discovery was made. But such a bill was almost invariably brought in aid of an action at law, and never prayed for relief. Story's Equity Pleadings, Sec. 311.

Under our statute, however, the disclosures made by the answer to such a bill are not to be deemed conclusive. Starr & Curtis' Statutes, Chap. 22, Sec. 25.

This bill is something more than a bill for discovery. The discovery is merely one object sought, and the answer is

no more conclusive than it would have been had the bill been one falling under any other branch of chancery jurisdiction. *Heisler v. Dickinson*, 17 Ill. App. 193; *Schroeter v. Brown*, 59 Ill. App. 24.

MILLARD R. POWERS, attorney for appellees.

The order of the court was the only one that could be properly made, in view of the absence of allegations concerning either specific property, contracts or dealings in which the judgment debtors might be interested. *Philadelphia Fire Ins. Co. v. The Central Nat. Bk.*, 1 Brad. 344; *U. S. Ins. Co. v. Central Nat. Bk.*, 7 Brad. 426; *Field v. Gorton, Chapman & Co.*, 15 Brad. 458.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant filed a judgment creditor's bill, calling upon the appellees to answer under oath, which they did, denying everything upon which the appellant could have any relief. Thereupon the court dismissed the bill for want of jurisdiction to proceed further.

This action was in accord with the opinion of this court in *Phila. Ins. Co. v. Cent. Nat. Bk.*, 1 Ill. App. 344, and *N. S. Ins. Co. v. Cent. Nat. Bk.*, 7 Ill. App. 426, and with the opinion of the Appellate Court of the Third District in *Fifield v. Gorton*, 15 Ill. App. 458, in neither of which cases was Sec. 25, Ch. 22, "Chancery," alluded to. But the action of the court was in opposition to the opinion of this court in *Heisler v. Dickinson*, 17 Ill. App. 193, and *Schroeter v. Brown*, 59 Ill. App. 24, in neither of which cases was either of the three earlier cases alluded to. In *Addyston Pipe and Steel Company v. City of Chicago*, 58 Ill. App. 273, we decided that the city could not be made defendant to a bill of this character, and March 28, 1896, the Supreme Court reversed our judgment (Legal News, April 4, 1896, p. 256), distinguishing the case from *Merwin v. City of Chicago*, 45 Ill. 133, on the ground that if the answer of the city denied indebtedness that would be the end of the litigation, and

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cited the three cases herein first cited, as well as *Bouton v. Smith*, 113 Ill. 481, as authority, and still with no allusion, either in the opinion reversing our judgment or in *Bouton v. Smith*, to Sec. 25.

We may believe that the reason for distinguishing from *Merwin v. City of Chicago* is not well founded, but it is our business to obey, not to criticise, the decision.

The Circuit Court acted upon the doctrine approved by the Supreme Court, and the decree appealed from is affirmed.

Daniel W. Parker v. Adolph Raphael, a minor, etc.

1. JURISDICTION—*By an Appeal.*—Where a justice of the peace has jurisdiction over the subject-matter of a suit, an appeal to the Circuit Court will give jurisdiction over the person of the appellant.

Transcript from a Justice of the Peace.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

ADELOR J. PETIT, attorney for appellant.

WALKER, BEACH & DAVIS, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

We can more briefly dispose of this case by admitting the premises of the appellant, that the justice of the peace who rendered judgment against him, and from which judgment he appealed to the Circuit Court, never obtained jurisdiction over the person of the appellant on a change of venue from another justice of the peace. Yet the justice had jurisdiction of the subject-matter, and the appeal gave the Circuit Court jurisdiction of the person of the appellant as well as of that subject-matter.

VOL. 64.] **Bowes v. Industrial Bank of Chicago.**

Only for lack of jurisdiction by that justice over the subject-matter—not the person of the defendant—is the suit to be dismissed on his appeal from the judgment of the justice. *Swingle v. Haynes*, 22 Ill. 241; *McGregor v. Village of Lovington*, 48 Ill. App. 202.

This is the only question in the case, and the judgment, rendered after refusing to dismiss the case, is affirmed.

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Edwin J. Bowes, Jr., and John R. Bowes, doing business as Edwin J. Bowes, Jr., & Bros., v. The Industrial Bank of Chicago.

1. **BILL OF EXCHANGE—What is.**—An instrument in the following language—

CHICAGO, June 17, 1892.

To E. J. Bowes, Jr., & Bros.:

This is to certify that Empire Building Co., contractor for the entire work of your building No. —, Fulton street, is entitled to a payment of five hundred dollars.

Contract, \$7,850, by the terms of the contract.

Previous issues,	\$6,825
Present issue,	500
	—
Balance,	\$925

WILSON & MARBLE,

By A. H. DODD—

is a bill of exchange.

2. **SAME—When to be Presented for Payment.**—A bill of exchange must be presented to the drawee, at the farthest, on the next business day after its reception, if the receiver is within reach of the person upon whom it is drawn.

3. **SAME—Notice when Acceptance or Payment is Refused.**—When the acceptance or payment of a bill of exchange is refused, notice must be given to the drawer by the next business day, if he be within reach, or he will be discharged.

4. **SAME—When the Drawer is Entitled to Notice.**—Although the drawer has no funds to his credit, yet, if he has reasonable grounds to expect that the bill would be honored, he is entitled to notice.

5. **SAME—Duty of the Endorsee.**—It is the duty of the indorsee to be diligent in presenting the bill for payment, and also in giving notice of non-payment; the liability of the drawer is contingent upon due presentation and notice of non-payment.

Bowes v. Industrial Bank of Chicago.

6. *SAME—Application of the Rule in this State.*—The court does not regard the rule in this State as to presentation, notice of non-payment, and consequent damage in the case of bank checks, as applicable to such a bill of exchange as is given in the first note of this syllabus.

Assumpsit, on a bill of exchange. Appeal from the Superior Court of Cook County; the Hon. JAMES GOOGIN, Judge, presiding. Heard in this court at the March term, 1896. Reversed and judgment entered in this court. Opinion filed May 14, 1896.

WOOLFOLK & BROWNING, attorneys for appellants.

JONES & STRONG, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The action in this case was based upon the following instrument:

“\$500.

No. 4,794.

CHICAGO, June 17, 1892.

To E. J. Bowes, Jr., & Bros.:

This is to certify that Empire Building Co., contractor for the entire work of your building, No.—Fulton street, is entitled to a payment of five hundred dollars.

Contract. \$7,850, by the terms of the contract.

Extra work.

Remarks.

Deductions.

Total.

Previous issues,	\$6,325
Present issue,	500
Total,	<hr/> \$6,925
Balance,	<hr/> \$925

WILSON & MARBLE,

(Indorsed:) Peabody, Houghteling & Co.

By A. H. Dodd.

Pay to the order of Empire Building Co.

JOHN R. BOWES.

Pay to the order of Industrial Bank.

EMPIRE BUILDING CO.,
G. C. McARTHUR, Treas.”

The signatures to, and the making of the order, and the indorsements, are admitted.

In Barnes v. Industrial Bank of Chicago, 58 Ill. App. 498, we held this to be a bill of exchange.

Appellants, in 1892, were erecting a certain building on their Fulton street property, at the contract price of \$7,850.

The Empire Building Company was the contractor, Wilson & Marble were the architects, with A. H. Dodd, their superintendent.

Messrs. Peabody, Houghteling & Co. had made a building loan on the property. The course pursued by the parties was for Wilson & Marble to issue certificates from time to time to the Empire Building Company, that the company was entitled to so much money on account. These were indorsed by appellants to Peabody, Houghteling & Co., "Pay to the order of," and then taken to Peabody & Co., where they were paid.

On June 17, 1892, the certificate sued on, No. 4,794, calling for \$500, was issued by Dodd, superintendent, and indorsed by Bowes, and taken to Peabody's for payment. Peabody & Company's cashier was out; a clerk in their office said, "the certificate is all right." The agent of the Empire Building Company did not wait for the return of the "cashier," but sold the paper to appellee. Appellee, during the last week in June, sent Frank Goerke, an employe, twice to Peabody's, and each time was told they were not ready to pay. Appellants were not notified of such failure to pay.

John G. Schaar, cashier for appellee, about a month after this date, June 17, 1892, presented this paper to Peabody, Houghteling & Co., and was referred to the man in charge of loans, who stated that he did not know anything about it, but that he should come in again in a week or fourteen days; that he called in about fourteen days, and was told by the same person, in the same office, that they, Peabody, Houghteling & Co., had no reason to pay this money on the certificate, because they had paid out all the money they had, and would not acknowledge this for payment until

Bowes v. Industrial Bank of Chicago.

Bowes put in additional money. He also states that the first time he presented the paper for payment they neither gave any reason for non-payment nor any refusal.

The assistant cashier for appellee, Henriques, handed the bill to Schaar, the cashier, for presentation on the 12th or 15th of July, and it was returned unpaid; after it was returned by Schaar the second time, Henriques himself presented it to Peabody, Houghteling & Co. for payment on the 3d or 4th of August, and they referred him to Bowes Bros., saying they did not have sufficient funds to meet it. Henriques then went to see appellants themselves.

On August 3d or 4th the certificate was for the last time presented, and payment refused, and then for the first time, appellants were notified that the certificate had not been paid, and payment was demanded of them.

In the meantime, after the certificate sued on had been issued, two other certificates were issued for \$210 and \$700, respectively, and presented and paid promptly, which exhausted the funds and the amount of the contract, and caused an overpayment of \$385.

All parties lived in Chicago, and were well known business men, with down-town offices. Appellants in the case at bar offered to prove :

1st. That the contractors were already overpaid, and that no extras were claimed by, or allowed to, the contractors.

2d. That the Empire Building Company had failed and gone out of business prior to November 3, 1892, when appellants were first notified.

3d. That a mistake was made in the architect's office, whereby certificates were issued for \$885 too much, and that at the time the certificate in question was called to appellant's attention \$385 had already been overpaid, and for that reason appellants declined to pay the certificate.

4th. That neither appellants nor their architect knew anything of the mistake in the issue of these certificates, until after August 3, 1892 (when they looked the matter up), and that John R. Bowes knew nothing of the state of

the accounts when he indorsed the certificate in question, but relied on the architect.

The court below refused to admit any of this proof.

It appears that when this draft was made, the drawers, appellants, had in the hands of the drawee \$525. The draft was given for value, and was purchased by appellee for value.

After it was given, and after it had been purchased by appellee, appellants made other drafts on the drawee to the amount of \$910; thus appellants afterward overdraw their account to the amount of \$385.

A bill of exchange must be presented to the drawee at the farthest on the next business day after its reception, if the receiver is within reach of the person upon whom it is drawn. *Strong et al. v. King*, 35 Ill. 9; *McDonald v. Mosher*, 23 Ill. App. 206; *Continental Bank v. Cornhauser & Co.*, 37 Ill. App. 475-480; *Bickford v. First National Bank*, 42 Ill. 238.

When acceptance or payment of a bill is refused, notice must be given to the drawer by the next business day, if he be within reach, or he will be discharged. *Parsons on Notes and Bills*, Vol. 1, p. 513; *Am. & Eng. Ency. of Law*, Vol. 2, p. 407; *Walker v. Rogers*, 40 Ill. 278; *Ogden v. Saunders*, 12 Wheaton 213; *Weber v. Mathews*, 101 Mass. 481.

In the present case the question is, if there was a sufficient excuse for the delay in giving notice. Although there were no funds to the credit of the drawer, yet if he had reasonable ground to expect that the bill would be honored, he is entitled to notice. *Parsons on Notes and Bills*, Second Ed., Vol. 1, 535; *French v. Bank of Columbia*, 4 Cranch 141.

Appellant not only had authority to draw, but had funds in the hands of the drawee. The person to whom the draft was given, The Empire Building Co., does not bring this suit, nor does it appear that it could recover anything upon this draft. The issue is between an indorsee, whose duty it was to be diligent in presenting the draft for payment, and also in giving notice of non-payment, and the drawer, who was entitled to such notice and did not receive it.

The liability of the drawer is contingent upon due presentation and due notice of non-payment.

Boley v. Lake St. Elevated R. R. Co.

The trial court inadvertently failed to follow the holding of this court when the cause was, upon a former hearing, remanded. *Bowes v. Industrial Bank of Chicago*, 58 Ill. App. 498-503.

As to which the case of *Oldershaw v. Knoles*, 6 Ill. App. 325, is applicable.

We do not regard the rule in this State as to presentation, notice or non-payment, and consequent damage in the case of bank checks, as applicable to such a bill of exchange as was the instrument upon which this writ is based.

The judgment of the Superior Court for the plaintiff is reversed, and a judgment for the appellee will be entered upon a finding of facts.

Reversed, and judgment with finding of facts.

Daniel C. Boley v. The Lake Street Elevated Railroad Company.

1. **BOND AND MORTGAGE**—*To be Construed Together*.—A bond and the mortgage made to secure it, when they are made at the same time, are to be construed together, as if they were parts of one instrument and in relation to the same subject, as parts of the same transaction, together constituting one contract.

2. **SAME**—*Mortgage may Qualify the Terms of the Bond*.—The mortgage may, as well as the bond, describe the debt and may thus qualify the terms of the bond.

3. **SAME**—*Holder of the Bond may Deprive Himself of the Right to Sue*.—Where the bond and mortgage are taken together as one transaction the holder of the bond may, by express stipulation in the mortgage, deprive himself of any right of action at law on the bond, except in a certain contingency. He may vest in a trustee his right to sue upon default in the payment of his bond.

4. **CONSTRUCTION OF CONTRACTS**—*Restriction upon the Right to Sue*.—A provision in a mortgage restricting the right of the holder of a bond secured thereby to bring an action at law thereon upon default in the payment thereof is to be strictly construed, but is not to be set aside by such reading as is opposed to the plain meaning of the language employed.

5. **NEGOTIABLE INSTRUMENTS**—*What Are*.—An instrument is negotiable when the legal title to it and to the whole of the money expressed

upon its face may be transferred from one to another by indorsement and delivery by the holder or by delivery only.

6. *SAME—Restrictions upon the Right to Sue.*—An interest coupon attached to a bond for the payment of money secured by a mortgage does not lose its negotiable character because of a condition in the mortgage that suit shall not be brought upon it unless upon the happening of a certain contingency.

Assumpsit, on an interest coupon. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

STATEMENT OF THE CASE.

This was an action by appellant against appellee to recover \$25, the amount of an unpaid interest coupon, falling due January 1, 1895, on one of appellee's first mortgage bonds.

The case was originally brought in a justice court, where judgment was rendered against appellant, who appealed to the Circuit Court. At the trial in the Circuit Court, both parties agreed to waive a jury and submit the case to the court for trial.

On the trial appellant's attorney put in evidence bond No. 7,473 of the Lake Street Elevated Railroad Company, and an interest coupon for \$25, maturing January 1, 1895, which had been clipped from said bond.

This interest coupon is on its face as follows:

“\$25. \$25.

On the first day of January, A. D. 1895, The Lake Street Elevated Railroad Company will pay to the bearer, at The American Trust and Savings Bank, in the City of Chicago, or at the Farmers' Loan and Trust Company, in the city of New York, twenty-five dollars (\$25) in United States gold coin, for six months' interest on its first mortgage bond, No. 7,473, without deduction for taxes as in said bond expressed.

J. H. WHITBECK,

“\$25. Treasurer.”

The bond introduced in evidence is as follows:

Boley v. Lake St. Elevated R. R. Co.

"No. 7,473. \$1,000.

UNITED STATES OF AMERICA.

State of Illinois.

The Lake Street Elevated Railroad Company,
First Mortgage, Five Per Cent Thirty-five Year Gold Bond.

For value received, The Lake Street Elevated Railroad Company, a corporation, created and existing under the laws of the State of Illinois, promises to pay to bearer (or if this bond be registered, to the registered holder thereof), at The American Trust and Saving Bank, in the city of Chicago, in the State of Illinois, or at the Farmers' Loan and Trust Company, in the city of New York, in the State of New York, on the first day of July in the year of our Lord one thousand nine hundred and twenty-eight (A. D. 1928), the sum of one thousand dollars (\$1,000) in gold coin of the United States of America, of the present standard of weight and fineness, and to pay interest thereon in like gold coin at the rate of five per centum per annum from January 1st, A. D. 1893, upon the presentation and surrender at said American Trust and Savings Bank or at the Farmers' Loan and Trust Company of the annexed coupons as they severally become due, semi-annually, on the first days of January and July of each year until said principal sum shall be fully paid.

Both principal and interest are payable without deduction on account of any taxes or assessments, by whatsoever authority the same may be levied.

The bond is one of a series of bonds of like tenor, date, amount and effect, numbered consecutively from one upward, all of which, whether issued or to be issued, together with the interest thereon, without reference to the time when said bonds shall be actually issued, are equally secured by a mortgage or deed of trust, bearing even date herewith, made by said railroad company to said American Trust and Savings Bank of Chicago, Illinois, as trustee, and the Farmers' Loan and Trust Company of New York City, as co-trustee, conveying all and singular its railroad and appurtenances, its real and personal property, rights of property

and franchises now owned or which may be hereafter acquired by said railroad company, as more particularly mentioned and described in said mortgage or deed of trust. Said bonds issued and to be issued by said railroad company, its successors and assigns, are issued subject to and in accordance with the terms and conditions of said mortgage or deed of trust; the amount of bonds to be issued is limited as provided in and by said mortgage or deed of trust.

Upon default in the payment of any interest on any of said bonds, the principal of said bonds may be made due and payable as provided in said mortgage or deed of trust.

It is agreed by the holder of this bond that no recourse shall be had for the payment of this bond, or the indebtedness evinced thereby, or the interest thereon, or any part thereof, to the individual liability of any stockholder or officer of said railroad company, such liability being waived, and by accepting this bond each successive holder assents to this provision.

This bond may be registered on the books of said railroad company at its financial agency in Chicago or in New York, and such registration noted thereon, after which no transfer thereof shall be valid, except on said books, until after registered transfer to bearer. The annexed coupons shall always be transferable by delivery.

This bond shall not be obligatory and valid until the certificate indorsed hereon has been signed by said trustee and co-trustee under said mortgage or deed of trust, or their successors.

In witness whereof, the said The Lake Street Elevated Railroad Company has caused its corporate seal to be hereto affixed, and the same to be attested by its secretary, and this bond to be signed by its president, and has attached hereto coupons authenticated by the fac-simile of the signature of its treasurer, this seventh day of April, one thousand eight hundred and ninety-three (A. D. 1893).

THE LAKE STREET ELEVATED RAILROAD COMPANY.

By JOHN A. ROCHE, President.

Attest: O. W. BRUNNER, Secretary."

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At the trial, appellant's attorney asked appellee's attorney to admit that said interest coupon was unpaid, and that appellant was the owner of the bonds and coupon, and appellee's attorney thereupon made the admission asked.

The following admissions of fact were then made:

“Mr. Richards: And I suppose you will admit that Mr. Boley, as the owner of this bond and coupon introduced in evidence, before bringing suit, and six months after this coupon was due, made demand on the trustees in the bond and mortgage referred to, to take action, because of the default in the payment of the interest, either by taking possession of the railroad of the defendant, declaring the principal sum secured by the mortgage or deed of trust due, and foreclosing the mortgage or otherwise, and the trustees refused to do.

Mr. Brown: We will admit that Mr. Boley made all the demands on the trustees that the holder of only one bond could make, and that the trustees did refuse to act on his request.

Mr. Richards: Very well; I will accept the admission as qualified.”

Appellant then rested his case.

Appellee thereupon introduced the trust deed in evidence, and then asked appellant's attorney to admit that about 7,474 bonds of like tenor and effect as the one introduced in evidence by appellant had been issued and sold by appellee, and the proceeds used in constructing and equipping the appellee's railroad property, and that these bonds are owned by various and different persons throughout the country. Thereupon appellant's attorney made the admission asked. Appellee then rested its case at the trial.

Article eighth of the trust deed is as follows:

“Eighth. Every holder of the bonds secured hereby accepts the same subject to the express understanding and agreement that every right of action, whether at law or in equity, under this indenture, is vested exclusively in the trustees, and under no circumstances shall the holder of any bonds or coupons, or any number of such holders, have any

right to institute any action at law upon any coupon or coupons, or otherwise, or any suit or proceedings in equity or otherwise, under this indenture, for the purpose of enforcing any payment, covenant or remedy herein, or in said bonds contained, or to foreclose this mortgage except in case of refusal on the part of the trustees to perform any duty imposed on them by this indenture in respect to such payment, covenant, remedy or foreclosure, after demand by a holder or holders of such bonds or coupons, and the production of such bonds or coupons by the holder thereof to the trustees, or the furnishing by such holders of other evidence satisfactory to the trustees that they are such holders, and the giving to the trustees of an indemnity satisfactory to them, securing them against liability by reason of the action requested, but no inaction by said trustees upon any such request shall be deemed a refusal until after the expiration of a reasonable time for the consideration thereof by said trustees.

In every case in which the trustees are authorized or required under any provision of this instrument to take any action upon the request of the holders of said bonds, the trustees shall have the right to require the person or persons representing such request to furnish proof as to the ownership of the bonds represented by him or them, by the production of said bonds, or by affidavits or other evidence satisfactory to the trustees, and if such proof be so required the said request will be without effect until such proof shall be furnished."

Appellant submitted to the court certain propositions of law which were refused by the judge; those propositions were as follows:

"1st. The court holds as a proposition of law that the plaintiff in this case is entitled to recover under the evidence offered in this case.

2d. The court holds as a proposition of law that the plaintiff in this case is entitled to bring suit in his own name upon the interest note or coupon introduced in evidence by plaintiff in this case, notwithstanding the provisions con-

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tained in the bond from which the said interest note or coupon was detached and the provisions contained in the mortgage or deed of trust securing the said bond.

3d. The court holds as a proposition of law that upon the evidence introduced in this case, the plaintiff is entitled to recover in this suit in his own name, and that the right of action upon the interest note or coupon, introduced in evidence by the plaintiff, is not vested exclusively in the trustee or co-trustee, or either of them, named in the mortgage or deed of trust introduced in evidence in this case.

4th. The court holds as a proposition of law that the interest note or coupon introduced in evidence in this case by plaintiff is a negotiable instrument, and that the title to the same passes by delivery, and that the same is subject to all rules applicable to a promissory note, and that the same is not controlled by the provisions contained in the bond or mortgage or deed of trust, or either of them, introduced in evidence in this case.

The court found in favor of appellee, and entered judgment for appellee.

HERRICK, ALLEN, BOYESEN & MARTIN, and JOHN T. RICHARDS, attorneys for appellant.

KNIGHT & BROWN, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The question presented is as to the right of the particular bondholder to recover, under the circumstances, on the single coupon sued on, and involves the right of all the holders of the \$7,474,000 to recover under similar circumstances on any of the coupons which may come due during the life of the mortgage. With what the rights of the holders of coupons, only, would be, we are not now concerned.

A bond and the mortgage made to secure the same, when they are made at the same time, are to be construed together as if they were parts of one instrument, and in relation to

the same subject, as parts of the same transaction, together constituting one contract.

The mortgage may, as well as the bond, describe the debt, and may thus qualify the terms of the bond. *Jones on Mortgages*, Vol. 1, Sec. 71, 2d Ed.; *Muzzy v. Knight*, 8 Kans. 456; *Meyer v. Graeber*, 19 Kans. 165; *Bassett v. Bassett*, 10 N. H. 64; *Kennion v. Kelsey*, 10 Iowa 443; *Crafts v. Crafts*, 13 Gray 360.

In the present case, taking bond and mortgage together, it appears that the holder of the bond has by express stipulation deprived himself of any right of action at law thereon, except in a certain contingency.

Up to the happening of certain events he has vested in the trustees his right to sue upon default in the payment of his bond.

This is not an attempt to oust the courts of jurisdiction, but is merely the vesting in trustees the right to sue. Our attention has not been called to any case in which such transfer of a right to sue has been held void, although such stipulations have been in other cases considered. *Kennion v. Kelsey*, 10 Iowa 443; *Rothschild v. Ry. Co.*, 91 Supreme Court of New York 103; *McClelland v. Ry. Co.*, 110 N. Y. 469; *Manning v. Norfolk South. Ry. Co.*, 29 Fed. R. 838; *Teller v. E. T., V. & G. R. R. Co.*, 67 Fed. Rep. 168; *Guilford v. Minn., S. S. M. & A. Ry. Co.*, 48 Minn. 560.

Nor are we in this case called upon to say directly whether the coupon under consideration is by itself a negotiable instrument. Suit is brought upon it by the holder of the bond to which it was attached; the question here involved is as to the rights of a holder of bonds and coupons thereto belonging.

It is manifest that the party who purchased this bond, if he read the same, together with the trust deed, must have known that he acquired with it no right of action upon default in the terms of it, or of any of the coupons belonging thereto; that such right was vested in the trustees named in the mortgage, and could not be exercised by the holder of the bond until the happening of other things.

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Provisions of this kind are to be strictly construed. *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137; *Railroad Co. v. Fosdick*, 106 U. S. 47; *Morgan's L. & T. Railroad & Steamship Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171; *Alexander v. Central R. R. Co.*, 3 Dill. 487; Fed. Cas. No. 166; *Credit Co. v. Arkansas S. W. R. Co.*, 59 Fed. 957; *Farmers Loan & Trust Co. v. Winona & S. W. R. Co.*, 59 Fed. 957; *Mercantile Trust Co. v. Missouri, K. & T. Ry. Co.*, 36 Fed. Rep. 221.

Yet like other compacts strictly construed, they are not to be set aside by such reading as is opposed to the plain meaning of the language employed.

Such is the subtlety of the human mind, that with a determined will so to do, there can always be read out of expressions what is clearly therein.

It is not the province of courts, with reference to the interpretation of constitutions, statutes or contracts, to do otherwise than to diligently search for, and honestly apply, the true meaning.

Counsel ask, and we answer, that we do not hold that either the bonds or coupons are not negotiable.

An instrument is called negotiable when the legal title to the instrument itself, and to the whole of the money expressed upon its face, may be transferred from one to another by indorsement and delivery by the holder, or by delivery only. *Daniel on Neg. Instr.*, Vol. 1, Sec. 1.

The coupon under consideration is an absolute, unconditional promise to pay a definite sum of money at a fixed time. It thereby, as counsel for appellant says, contains all the *indicia* of negotiable paper. If there is attached thereto a condition that suit shall not be brought thereon until one month after the same becomes due, or until after demand and protest, or that for six months after the coupon becomes due the right to sue thereon is vested solely in A. B., trustee, is the negotiability of the instrument thereby destroyed? If such provisions are in the mortgage securing the note, is there any inconsistency between the two instruments?

In other words, is a right by the holder to bring suit as

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soon as the same is due, a necessary part of a negotiable instrument? If the legislature of this State should provide that no suit should be brought on any instrument providing for the payment of money until ten days after the same became due, would there be, here, no more negotiable instruments? We regard the mortgage, bonds and coupons as constituting one consistent contract.

The terms of the trust deed, and thus of the contract under consideration, are so plain that the judgment of the Circuit Court must be affirmed.

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Independent Order of Mutual Aid v. Paul Stahl, Guardian, etc.

1. **GUARDIANS—Right to Sue.**—A guardian has authority to demand and sue, in his own name, for all personal property and demands due his ward.

2. **PRACTICE—Re-assembling the Jury After Discharge.**—After a jury has rendered its verdict, been discharged and permitted to separate, and have mingled with other affairs, sat in other cases, etc., it can not be re-assembled to consider over again of a former verdict.

3. **SAME—Judgment for Damages Only, in Actions of Debt.**—The objection that the verdict and judgment in an action of debt is for damages only, can not be raised since the enactment of section 56 of the Practice Act of 1872.

4. **REMITTITUR—When the Verdict is too Large.**—Where the verdict is for a sum too large, the plaintiff may remit the excess. It is not necessary to send the jury back to reconsider it.

5. **APPELLATE COURT PRACTICE—Mere Irregularities Not Sufficient to Reverse.**—It is not the duty of a court of review to reverse a judgment for mere irregularities, or for errors which do not work an injury.

6. **SUICIDE—When a Question of Fact.**—The questions as to whether an insured person was insane at the time of his death and committed suicide or whether some other person killed him, are questions of fact for the determination of a jury.

Debt, upon a policy of insurance. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

JOHN P. AHRENS, attorney for appellant.

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JOSEPH R. BURKES, attorney for appellee; ANDREW J. HIRSCHL, of counsel.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This action was brought by Paul Stahl, guardian of Julius and Ernst Grundman, against the appellant, upon a beneficiary certificate issued by the appellant to one Oscar Grundman, wherein it was recited that Oscar Grundman was a member of said order, and entitled to all the rights and privileges of membership, and to participate in the mutual aid fund of the order to the amount of \$2,000, with accrued mutual aid assessments, upon due notice and satisfactory proof of his death, and the surrender of the certificate, legally received, to be paid as a benefit to his children, the said Julius and Ernst Grundman.

The beneficiary certificate contained the following provision, viz.:

“Provided, however, that should said Oscar Grundman commit suicide, then and in that case only the amount paid by him into the beneficiary fund, by virtue hereof, shall be paid to said beneficiaries, and which said amount shall be in full of all demands whatsoever arising out of or under this beneficiary certificate; that this certificate is issued expressly in consideration that all the representations made by said Grundman in his application and accompanying statement, now on file in the office of the grand secretary, are true, and that all lawful assessments shall be promptly paid; and that said Grundman shall, in every particular, comply with and abide by all the laws, rules and regulations of the order which now exist, or which may hereafter be adopted by the Grand Lodge of the State of Illinois.”

The application of said Oscar Grundman for membership was dated February 2, 1891, and contained the same clause against suicide set forth in the beneficiary certificate; and in answer to question fifteen, in his medical examination attached to the application, he stated he had never had disease of the brain or insanity.

The special pleas filed by appellant set up in substance that said Oscar Grundman committed suicide, that the amount paid by him into the beneficiary fund was \$8.75, and that therefore appellant is liable on said beneficiary certificate only to that amount, and that it offered to pay that amount to the plaintiff in full satisfaction of the beneficiary certificate, but that he refused to accept the same.

It was admitted by counsel, upon record, that before the commencement of the suit defendant tendered to plaintiff, as guardian of said minors, \$8.75, and that was the amount paid by said Oscar Grundman into the beneficiary fund of the defendant, and that the plaintiff refused to accept the same, and that said tender has been kept good, by payment of said amount into court, and that the plaintiff is the duly appointed and qualified guardian of said minors.

The case below resulted in a verdict and judgment for \$2,000 against the appellant, and this appeal is for a review of that judgment.

We will first consider the point that the action was wrongly brought in the name of the guardian, instead of in the names of the children, by him, and will dispose of it by reference to Sec. 17, Ch. 64, Rev. St., and by a quotation from the opinion of the court in *Muller v. Benner*, 69 Ill. 108:

“He (a guardian) has authority to demand and sue, in his own name, for all personal property and demands due the ward.”

He has, however, no power to bring a suit in his own name in relation to the real estate of his ward, which are the cases cited by appellant.

The next point has reference to the alleged error concerning the verdict upon which judgment was entered.

The abstract of the bill of exceptions shows in that regard as follows:

“Sealed verdict for plaintiff, signed by all the jurors, as follows:

‘We, the jury, find the issues for the plaintiff, and assess the plaintiff’s damages in the sum of two thousand eight and 75-100 dollars.’

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Whereupon, after said jury had been polled, said verdict was ordered by the court to be entered, and said jury were permitted to separate, and the defendant then and there duly entered its motion for a new trial in said cause.

And thereupon, after the jury in this case had presented to the court their sealed verdict in the forenoon of October 7, 1895, and after the jury had been polled and the verdict entered and a motion for a new trial entered, and the jury permitted to separate, as aforesaid, and after all of the jurors, with the exception of one, had been called as jurors in another case, and after they had rendered a verdict in that case, the counsel for the plaintiff in this case, in the afternoon of said day, moved the court to vacate all orders this day entered in this cause, and re-submit the cause to the jury which had considered it and to give to the jury the instruction tendered, in the words and figures following, to wit:

‘The jury is instructed that if they find for the plaintiff they will assess his damages at \$2,000, but if they find for the defendant, then they will so state.’

Which motion was opposed by the counsel for the defendant, and counsel for the defendant then and there objected to the granting of said motion.

But the court overruled said objection of counsel for defendant and granted said motion of counsel for plaintiff, to which ruling and decision of the court, and to the giving of said last named instruction, the defendant, by its counsel, then and there moved the court to set aside the verdict last rendered in said cause and to grant a new trial of said cause, which said motion, together with the grounds therefor, is in words and figures following, to-wit,” etc.

Then followed the overruling of the motion for a new trial, and of a subsequent motion in arrest of judgment, and the entry of judgment for \$2,000 and costs.

The record proper, as certified by the clerk, is less circumstantial than the bill of exceptions, in reciting what took place after the return into court of the first verdict, and is as follows:

"Whereupon said jury was permitted to separate and the defendant enters herein its motion for a new trial in said cause. Whereupon all orders and entries this day made in this cause are on motion of plaintiff's attorney vacated. And thereupon, on motion of plaintiff's attorney, said jury is recalled, and retire to their room to reconsider of a verdict, to which the defendant duly excepts, whereupon said jury returned into open court and say: 'We, the jury, find the issues for the plaintiff and assess plaintiff's damages at the sum of \$2,000,' to which the defendant duly excepts, and enters herein its motion to set aside said verdict, and for a new trial in said cause."

It is nowhere made to appear upon which verdict the judgment was entered.

As to the matters recited, both by the clerk in his entries and by the trial judge in the bill of exceptions signed and sealed by him, the latter should doubtless prevail if there be any inconsistency between them, but if they be not inconsistent in material respects, we think such an effect should be given to the substance of the court's action as will do justice and make the verdict of the jury effectual.

It, therefore, not appearing upon which verdict the judgment was entered, we think we should give effect to the judgment as applied to the verdict which will sustain it. And by this we assume that the law is that after a jury has been discharged and permitted to separate, and especially so if a considerable time has elapsed after their discharge, and the jurors have mingled in other affairs and sat in and rendered a verdict in another case, as the bill of exceptions shows that with one exception they did, they can not be reassembled to consider over again of a former verdict. *Ayer v. Chicago*, 149 Ill. 262, 269; *Parker v. Fisher*, 39 Ill. 164, and authorities cited in both.

The first verdict does not appear to have ever been vacated. The vacation of "all orders and entries this day made" certainly does not in terms include the verdict. There was an order for the jury to separate and an entry of the verdict, both of which may have been and probably

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were vacated, but we do not regard that thereby the verdict itself was vacated and set aside.

The first verdict so standing exceeded the judgment by \$8.75.

If the second verdict be treated as irregular, unnecessary, and surplusage, why should not the judgment be allowed to stand upon the first verdict for a less sum than it awarded? Why may appellant complain? It is apparent that if the appellee was entitled to recover at all, the amount of \$2,000 was the least that he was entitled to, and it was clearly to appellant's advantage that the verdict should be for that least possible sum. It is not as if the judgment had been rendered for an amount in excess of the verdict. It was for a less sum, and we think the subsequent motion by the appellee to resubmit the cause to the jury with an instruction to render a verdict for such less sum, may, without violence to proper rules of practice, be construed as equivalent to a *remitititur* from the first verdict of the excess of that verdict over the judgment that was entered.

It is not the duty of a court of review to reverse a judgment for mere irregularities, nor even for errors which do not work an injury.

We think the court had not lost its power and control over the verdict, and that under the circumstances it might, as was done, enter the judgment that followed.

The following cases are as nearly applicable as any we can find: *Parker v. Fisher*, 39 Ill. 164; *O'Brien v. Palmer*, 49 Ill. 72; *Davidson v. Devine*, 70 Cal. 519.

The further error is assigned that the action was debt, while the verdict and judgment were in damages only.

We regard that since the Practice Act of 1872 (Sec. 56), such objection can not be taken advantage of. *R., R. I. & St. L. R. R. Co. v. Steel*, 69 Ill. 253; *Bowden v. Bowden*, 75 Ill. 111.

The remaining assigned errors go to the merits of the cause, and invoke the protection afforded to the appellant because of the clause in the beneficiary certificate which exempts it from liability when the member commits suicide.

It is not contended that appellant would not be liable if Grundman were insane when the act of killing himself, assuming that he shot and killed himself, was committed.

We can not take the time to review the evidence. The questions of Grundman's insanity and of who did the killing were ones of fact, and have been passed upon by the jury and settled adversely to the appellant, upon evidence of a strongly conflicting nature, and will not be reviewed upon appeal.

Nor will we take time to discuss the questions argued concerning the instructions. We think the law as applicable to the case was laid down to the jury with substantial accuracy; and the judgment being in accord with what seems to be the justice of the case, it will be affirmed.

Charles A. Williams and Konstantin Zillhart v. Margaret A. Wallace.

1. POSSESSION—*What is Sufficient to Maintain Replevin.*—A person gave his note for the accommodation of a plumber, in payment for a lot of tools and stock in trade, and took from him an absolute bill of sale of the tools and stock; the plumber went through the formality of delivering possession by handing over the key to the shop containing the stock and tools, which was immediately returned to him. Afterward such person took possession of the property and put a padlock on the door, and placed a custodian in charge. *Held*, that the possession was sufficient to protect him against the liens of execution issued subsequent to taking such possession.

2. PRACTICE—*Propositions of Law.*—A court is not bound to hold as law every proposition that a party may choose to submit, and the holding of one of two propositions, both of which embody the same principle of law, is all it is bound to do.

Replevin.—Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

KRAFT, WILLIAMS & KRAFT, attorneys for appellants, contended that where the property is of such a character as to

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be capable of being removed, there must be a real and permanent delivery and continued change of possession to enable the purchaser to hold the property against an officer levying an execution upon it for the debt of the vendor. And if the property is permitted to remain with the vendor the sale will be deemed fraudulent in law as to creditors and subsequent purchasers, although it may have been made in good faith and for an adequate consideration. *Curran v. Bernard*, 6 Ill. App. 343; *Allen v. Carr*, 85 Ill. 388; *Tecknor v. McClelland*, 84 Ill. 471; *Thompson v. Wilhite*, 81 Ill. 356; *Thornton v. Davenport*, 1 Scam. 73; *Reed v. Eames*, 19 Ill. 595; *Rozier v. Williams*, 92 Ill. 187; *Johnson v. Helloway*, 82 Ill. 334; *Gradle v. Kern*, 100 Ill. 564; *Harts v. Jones*, 21 Ill. App. 150; *Kitchell v. Bratton*, 1 Scam. 300; *Wood v. Loomis*, 21 Ill. App. 604.

In case of an unconditional sale of specific chattels delivery is not essential to complete the sale and pass the title as between the parties, where by the agreement nothing remains to be done but for the purchaser to take possession. But as to creditors and *bona fide* purchasers, the rule is different, as a delivery is indispensable to complete the sale so as to render it valid against them. *Haschle v. Morris*, 131 Ill. 593; *Thompson v. Wilhite*, 81 Ill. 356; *Lefever v. Mires*, 81 Ill. 456; *Ticknor v. McClelland*, 84 Ill. 471; *Broadwell v. Howard*, 77 Ill. 305; *Rozier v. Williams*, 92 Ill. 187; *Burnell v. Robertson*, 5 Gilm. 282; *Dunlap v. Berry*, 4 Scam. 327.

It is a well settled rule of law that a purchaser of personal property, in order to acquire title as against creditors of vendor or purchasers without notice, must reduce it to actual possession before their rights attach. *Curran v. Bernard*, 6 App. 343; *Lewis v. Swift*, 54 Ill. 436; *Broadwell v. Howard*, 77 Ill. 305; *Lefever v. Mires*, 81 Ill. 456; *Richardson v. Rardin*, 88 Ill. 124.

BORMAN & McGRATH, attorneys for appellee.

As between the parties, delivery is not essential to the completion of a sale of a chattel, which may remain with the vendor any length of time if taken by the vendee before

any lien attaches to it in the hands of the vendor, provided the transaction is conducted in good faith. *Cruikshank v. Cogswell*, 26 Ill. 366.

The question whether a mortgagee or pledgee of chattels has taken possession of the property before he had a right to do so under the terms of the mortgage or pledge, is one which concerns the mortgagor or pledgor alone, and can not be raised by third persons who had no lien upon the property at the time the possession was taken. *Gaar v. Hurd*, 92 Ill. 315.

In the absence of actual fraud, an instrument of conveyance of chattels constructively fraudulent, as against creditors of the vendor or mortgagor, because of some defect or omission therein, or in the acknowledgment or recording thereof, may be purged of fraud by the taking and retaining of possession of the chattels by the vendee or mortgagee, provided such possession is taken before creditors acquire any lien thereon. *Read v. Wilson*, 22 Ill. 376; *Gaar v. Hurd*, 92 Ill. 315; *Wilson v. Pearson*, 20 Ill. 81; *Gifford v. Wilson*, 18 Ill. App. 214; *Webber v. Mackey*, 31 Ill. App. 369; *Pinkstaff v. Cochran*, 58 Ill. App. 72; *Daggett v. Bates*, 26 Ill. App. 369.

Where a mortgagee of chattels has taken possession of the property under his mortgage, as to the rights of third persons subsequently acquired, it is immaterial whether the mortgage was acknowledged before the proper officer, or indeed, whether it was acknowledged at all. *Gaar v. Hurd*, 92 Ill. 315; *Chipron v. Feikert*, 68 Ill. 284.

Before a mortgagee or pledgee or other lien holder, in lawful possession of chattels, can be deprived of that possession by a subsequent judgment creditor of the owner, such creditor must tender to the lien holder in possession the amount of his lien. *Cobbey on Replevin*, Sec. 532.

A wrongful refusal of a court trying a cause without a jury to hold propositions of law, will not cause reversal of a judgment which is clearly correct. *North, etc., R. Co. v. Lake View*, 105 Ill. 207.

It is not error to refuse a proposition of law already em-

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bodied in another which is held. O'Bannon v. Vigus, 32 Ill. App. 473.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action of replevin brought by appellee to recover certain plumbers' tools and stock in trade, which had been levied upon by the appellants as the property of the firm of Aiken & Jorgens, valued at \$250.

The circumstances under which appellee claimed the property were in substance as follows:

Said firm, in order to secure appellee for giving her note for their use for \$276.89, dated July 31, 1895, and payable sixty days after date, made and delivered to appellee an absolute bill of sale of the property in question, situated in their shop. There was, within a week afterward, a formality gone through by the parties of delivering possession of the property by handing to appellee the key to the shop, which she at the same interview returned to them, and they kept on in possession and doing business, as before, until September 6th following.

On September 5th word was sent by one of the firm to the appellee that the other member of the firm was collecting money of the firm and not accounting for it, and that she had better take steps to protect herself.

Accordingly, on September 6th, she went to the shop and finding nobody there, she managed, with assistance, to obtain admittance a little after noon, and certainly before two o'clock in the afternoon, and took possession of the property in question by virtue of the bill of sale.

She then put a padlock upon the door, nailed up her own cards on the door, and placed a custodian in possession, who remained there continuously, except when relieved by the appellee for time to get his meals, during the day and night, and until the executions in question were levied and the property taken from appellee on the following morning.

The judgments upon which the executions were issued were recovered before a justice of the peace on the afternoon of September 6th, and the executions thereon were issued

and delivered to a constable ten or fifteen minutes before three o'clock of that afternoon.

The cause was submitted to the court without a jury, and he found in favor of the appellee.

There was some conflict in the evidence concerning the fact of possession by the appellee prior to the delivery of the executions to the constable, but we must regard the finding of the trial court in that matter as final, and we may add justifiably so, in our opinion, upon a fair review of all the evidence.

The appellants submitted to the trial court twenty propositions of law, of which one-half were held and the other half refused.

Complaint is made that the holding of some of such propositions and the refusal of others manifested an inconsistency by the court in the view it took of the law of the case. That does not necessarily follow. The court was not bound to hold as law every proposition that the appellant chose to submit, and the holding of one of two propositions, both of which embodied the same principle of law, was all that the court was bound to do, or that the appellants had a right to ask. We have examined the propositions in respect of which fault is found, but find no error.

Under the evidence the appellee had a clear right to take possession of the goods described in the replevin writ, either with or without the consent of her vendors, and having done so before the executions became a lien upon them, her right to maintain replevin for them was secure; and she having been obliged to pay the note, for indemnity or security against which the bill of sale was made to her, it would be palpably unjust that appellants should be permitted to keep the goods from her.

The judgment was right, and it is affirmed.

Prairie State Loan and Building Association v. Henry Gorrie.

1. **BUILDING AND LOAN ASSOCIATIONS—*Liable for the Acts of the Secretary.***—A building and loan association is liable for whatever fraud or wrong its secretary commits upon its stockholders while acting within the scope of his apparent authority.

2. **SAME—*Secondary Proof of Notice of Withdrawal.***—In an action against a building and loan association for money due on withdrawal, notice to the association to produce the notice of withdrawal served upon it is not necessary in order to let in secondary evidence of such notice.

Assumpsit, for money had and received. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

KRAFT, WILLIAMS & KRAFT, attorneys for appellant.

F. L. SALISBURY, attorney for appellee.

A corporation has notice of facts which come to the knowledge of its officers or agents while engaged in the business of the corporation, provided those facts pertain to that branch of the corporate business over which the particular officer or agent had some control. Cook on Corporations, Sec. 727; Sangamon Coal & M. Co. v. Wiggerhans, 122 Ill. 279.

The business of corporations can only be carried on through their officers, agents and servants; they are bound, in their ordinary affairs, by the acts and admissions of their officers, agents and servants. L. S. & M. S. Ry. Co. v. B. & O. & C. R. R. Co. 149 Ill. 289.

They are presumed to have agents and servants acting for them in the usual course of dealing within their powers, and their acts should bind their principals. Ryan v. Dunlop, 17 Ill. 45.

A corporation is liable on one of its notes in the hands of a *bona fide* purchaser before maturity, when it is signed by an officer authorized generally to give notes in its behalf,

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though such officer, in signing the particular note in question, exceeded his authority or the powers of the corporation. *Merchants Nat. Bank v. Citizens G. L. Co.*, Vol. 38 Cent. Law Journal, p. 45.

A principal is liable to third persons for misfeasances, negligence and omissions of duty of agent, leaving him his remedy against the agent. And such liability extends to private corporations. *Story on Agency* (8th Ed.), 400, 401; *Taylor v. Taylor*, 20 Ill. 652; *President, etc., Manhattan Co. v. Lydig*, 4 Johns. (N. Y.) 374; *Angell & Ames, Corporations*, 364.

Corporations carrying on business for profit are equally liable for the fraud of their agents with other principals. *Evans' Law of Principal and Agent*, 470.

The association is liable to third parties for whatever the agent does or says, whatever contracts, representations or admissions he makes, whatever negligence he is guilty of, and whatever fraud or wrong he commits, provided the agent acts within the scope of his apparent authority. *Thompson on Building Associations*, Sec. 3, p. 53.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The question in this case, is, which of two innocent parties shall suffer by the fraud of another. Jacob David was secretary of the appellant; the appellee held shares in three series of stock of the association.

There is a new series quarterly, beginning in January, if the prospectus of the association is strictly followed, but in fact the fourteenth series was issued in the last quarter of 1886, and in the last quarter of 1890, the series was number only twenty-nine. In the fourteenth series one Van Cleef held twenty shares upon which, in October, 1890, he had (we infer) paid \$490, being \$10 each month from October, 1886, to October, 1890, both included. In October, 1890, David told the appellee that the association had twenty shares of the fourteenth series for sale—which well might have been true, in effect, under Sec. 6, of the act of 1879,

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“Homestead Loan Associations,” but seems to have been false in fact—and that it would cost \$575. Two days later David brought to the appellee a certificate for the shares, which in fact, had been issued, as shown by the books of the association, upon an original taking by the appellee of twenty shares in the twenty-ninth series but which certificate David changed by erasing “29” in the body of the certificate and inserting “fourteenth,” thereby implying that it was stock upon which \$490 had been paid, and which was entitled to share in the accrued profits of forty-nine months. With the certificate David delivered to the appellee a pass book, such as it seems was the custom of the association to supply to its shareholders, in which their credits were entered, made out to the appellee, purporting that he had twenty shares in the fourteenth series with a credit of \$490 on a transfer from Van Cleef. The appellee paid David \$572.75, and thereafter continued to pay \$10 each month upon the shares, without notice of the fraud until the fall—the exact date is not fixed—of 1892. He continued to pay, after notice, until April, 1893, but insisting that his payments were upon the fourteenth series.

At the time he received the certificate the appellee noticed the erasure, but thought nothing of it, and said nothing to David about it. The certificate was signed by the president, as well as by David as secretary, and stated, without erasure, that the stock was issued October 14, 1886, which could have been true only of the fourteenth series.

Van Cleef surrendered his stock to the association in October, 1892. He and the appellee had no communication with each other; did not know each other. The money David received from the appellee did not go to Van Cleef, nor to the association. The association did not discover the fraud until September, 1892.

It is a fair inference that David took out the certificate, paying for October and November (\$20) himself, in the name of the appellee, and without his knowledge, and pretended to sell to the appellee the stock of Van Cleef nearly two years before he surrendered it. The question is—as

before stated—which of these two innocent parties shall suffer by the fraud of David.

Presumably it was a duty of the secretary, David, to prepare all certificates for shares.

A blank printed on the backs of certificates held him out as the proper person to be authorized as attorney for the shareholder to transfer or cancel shares on the books of the association.

The word "fourteenth," written upon an erasure, was no cause for suspicion, being explained by the statement at the top of the certificate that the stock was issued October 14, 1886, which could be true only of the fourteenth series. How David avoided notice of that statement by the president does not appear. It is matter of common knowledge that the dealings between building associations and their members are mainly through the secretary. During part of the period of these transactions the office of the company was at the house of David.

We hold that the association must bear the consequences of his fraud. The appellant's brief questions the sufficiency of the pleadings to fit the case, but no such question was raised below, where, if there had been any valid objection, it might have been removed by amendment. It is now too late. *Citizens G. & H. Co. v. Granger*, 19 Ill. App. 201; 118 Ill. 266; *Hess v. Rosenthal*, 55 Ill. App. 324.

It is also objected that the appellee was allowed to prove his notice of withdrawal under Sec. 6 of the act by a copy, without sufficient notice to the appellant to produce the original. As the association denied that he held shares in the fourteenth series, it is not certain that he was required to give any notice of withdrawal; and if he was notified, to produce a former notice is not necessary to let in secondary evidence. *Brown v. Booth*, 66 Ill. 419; *Williams v. Ger. Mut. Ins. Co.*, 68 Ill. 387.

There is no dispute or doubt about the facts, and as upon them we hold that the appellee is entitled to recover, it is unnecessary to consider the instructions, and the judgment in favor of the appellee for the value of the twenty shares as of the fourteenth series, is affirmed.

Prairie State Loan and Building Association v. Leon Nubling.

1. **BUILDING AND LOAN ASSOCIATIONS—*Liable for the Acts of the Secretary.***—The fact that the secretary of a building and loan association committed frauds upon it, does not affect its liability for his acts, while acting within the scope of his authority.

2. **INTEREST—*Application of the Act of 1891.***—The statute of 1891, reducing the rate of interest to five per cent, does not affect the rate to be allowed upon instruments executed prior to its passage.

Bill for an Account.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

KRAFT, WILLIAMS & KRAFT, attorneys for appellant.

SAMUEL J. HOWE, attorney for appellee.

The secretary of a building and loan association sustains the relation of a general agent to the association. Endlich on Building and Loan Associations (2d Ed.), Par. 174.

Where an agent has performed certain acts, which have been acquiesced in by the association, it thereby ratifies those acts and becomes bound by them to the same extent as though it had originally directed the acts. Chicago Building Society v. Crowell, 65 Ill. 456.

The rule that whoever is capable of entering into a contract which another, unauthorized, has assumed to make for him as his agent, and who is still capable of entering into it, is capable of ratifying that contract, thereby rendering it good from the beginning, the same as though he had originally authorized or made it, applies to corporations the same as to individuals. Mechem on Agency, 117, 118; Williams v. Butler, 35 Ill. 544.

A person openly and notoriously exercising the functions of a particular agency of a corporation, will be presumed to have sufficient authority from the corporation to so act. Singer Mfg. Co. v. Holdfodt, 86 Ill. 456; First Nat. Bank v. Dunbar, 118 Ill. 632; Sweet v. Barney, 23 N. Y. 335.

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The corporation, and not an innocent third party, will be held liable for any irregularity of its agent. *MERCHANTS BANK v. STATE BANK*, 10 Wall. (U.S.) 644; *CALDWELL v. THE NAT. MOHAWK VALLEY BANK*, 64 Barb. (N. Y.) 342; *BOLLES ON BANK OFFICERS*, Sec. 25.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Jacob David was the secretary of the appellant, and under its by-laws it was part of his duty "to receive all money paid in to the association and hand the same over promptly to the treasurer, taking his receipt therefor."

The appellee paid to David, under color of having shares in the association, so much money that on account thereof the association accepted from David, as so much cash to the credit of his account, one warrant by the appellant on its treasurer, payable to the order of the appellee, for \$325, dated June 13, 1889, and another to the order of Sam Marco, but which, as between themselves, belonged to appellee, for \$965.55, dated December 11, 1890, neither of which warrants were indorsed by the payee thereof. The money on both of them belonged to the appellee. That the secretary committed frauds upon the appellant, is a defaulter, and has absconded, does not affect the right of the appellee to the money represented by the warrants, with interest thereon from the respective dates, at six per cent per annum. The statute of 1891, reducing the rate to five per cent, does not affect this case. *FIREMEN'S FUND INS. CO. v. WESTERN REFRIGERATING CO.*, 58 Ill. App. 329.

The appellee has recovered much less than the amount to which he is so entitled, and the decree is affirmed.

The master's report is not excepted to in a manner that calls for a review of it. *McMANOMY v. WALKER*, 63 Ill. App. 259. Affirmed.

William E. Webbe v. Western Union Telegraph Company.

1. **TELEGRAPH COMPANIES — Limitations on the Time to Present Claims.**—A condition printed upon a telegraph message, that the company will not hold itself liable for errors or delays in the transmissions or delivery of unrepeated messages in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission, is a condition precedent to the recovery of damages in such cases.

2. **SAME—Ignorance of Conditions Printed on Messages.**—Ignorance of the conditions printed upon a telegraph message does not relieve the sender of the message. Where such sender is aware of the existence of such conditions his neglect to inform himself of their requirements does not free him, in law, from a knowledge thereof.

Trespass on the Case.—Mistake in a telegram. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

PAGE & BOOTH, attorneys for appellant, contended that the right of the receiver of a telegram which has been negligently altered by the telegraph company, to sue the company for damages sustained through acting upon the telegram, is settled beyond controversy. Gray, *Communication by Telegraph*, p. 131, Sec. 74; *De la Grange v. S. W. Telegraph Co.*, 25 La. Ann. 383; *N. Y. & Wash. Print. Tel. Co. v. Dryburg*, 35 Pa. St. 298; *Western Union Tel. Co. v. Hope*, 11 Brad. 291; *Same v. Dubois*, 128 Ill. 248-254.

The sender of a telegram is not bound to the receiver by the terms of the message where it has been negligently altered by the telegraph company. Gray, *Com. by Tel.* 186, Secs. 105, 106; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554; *Pegram v. Same*, 100 N. C. 28; *Shingleur v. Same*, 18 So. Rep. 425; *Harrison v. Same*, 10 Am. & Eng. Cor. Cas. 600.

That the sender of such telegram was not bound by its altered terms, though not expressly decided, was necessarily

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involved in the decision of the court in the following cases: Western Un. Tel. Co. v. Dubois, 128 Ill. 248; Harris v. Western Union Tel. Co., 9 Phila. 88; N. Y. & Wash. Print. Tel. Co. v. Dryburg, 35 Pa. St. 298; Western Union Tel. Co. v. Richman, 8 Atl. Rep. 171.

Printed conditions upon a telegraph blank do not bind the party who uses such blank, unless it be shown by evidence *aliunde* that he knew and assented to such conditions. Tyler v. Western Un. Tel. Co., 60 Ill. 421; Western Union Tel. Co. v. Fairbanks, 15 Brad. 600.

So it has been repeatedly held with reference to the sixty-day limitation for presenting claims against the telegraph company. Western Union Tel. Co. v. Fairbanks, *supra*; Same v. De Golyer, 27 Ill. App. 489; Same v. Lycan, 60 Ill. App. 124.

The question whether the plaintiff knew of the sixty-day limitation and assented thereto, is not a conclusion of law, but is a fact to be submitted to and determined by the jury upon a consideration of all the surrounding circumstances. Field v. Chicago & R. I. R. R. Co., 71 Ill. 462; Western Un. Tel. Co. v. Fairbanks, *supra*; Boscowitz v. Adams Express Co., 93 Ill. 532.

The suit at bar is an action on the case by the sendee of a telegram claiming damages because of the tort of the telegraph company in delivering to him an erroneous message, upon which he has acted to his injury. The telegraph company can not limit the right of the receiver of a message, who sues in tort, by any stipulations contained upon the printed blank upon which the message delivered to him is written. Gray, Com. by Tel., 137, Sec. 75; West. Un. Tel. Co. v. Fenton, 52 Ind. 1; Same v. McKibben, 114 Ind. 511; Harris v. Westn. Un. Tel. Co., 9 Phila. 88; West. Un. Tel. Co. v. Richman, 8 Atl. 171; De la Grange v. S. W. Tel. Co., 25 La. Ann. 383.

WILLIAMS, HOLT & WHEELER, attorneys for appellee.

A provision that claims will not be recognized unless made within a specified reasonable time, is reasonable and

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valid. It is not an attempt to discharge the company of the duties annexed by law to its employment, but is simply a regulation designed to secure good faith and fair dealing between the company and its patrons. As such it is peculiarly applicable to the nature of the telegraph business. *W. U. T. Co. v. Fairbanks*, 15 Ill. App. 603; *W. U. T. Co. v. Beck*, 58 Ill. App. 564; *Wolf v. W. U. T. Co.*, 62 Pa. St. 83; *Lewis v. Great Western Ry. Co.*, 5 H. & N. 867; *Southern Express Co. v. Caldwell*, 21 Wall. 264; *Young v. W. U. T. Co.*, 34 N. Y. Superior Court, 390; 65 N. Y. 163; *Gray on Com. by Telegraph*, p. 62; *Sherrill v. W. U. T. Co.*, 109 N. C. 527; *Croswell on Law of Electricity*, Secs. 538, 540; *U. S. Express Co. v. Harris*, 51 Ind. 127; *Heiman v. W. U. T. Co.*, 57 Wis. 562.

Such a requirement is binding not only as a contract to which assent must be shown, but as a rule or regulation affecting all persons chargeable with knowledge of its existence, without assent. *Oppenheimer v. U. S. Express Co.*, 69 Ill. 62; *Western Trans. Co. v. Newhall*, 24 Ill. 469; *Boscowitz v. Adams Express Co.*, 93 Ill. 523; *Breese v. U. S. Tel. Co.*, 48 N. Y. 132; *Becker v. W. U. T. Co.*, 11 Neb. 87; *Schwartz v. A. & P. Tel. Co.*, 18 Hun 157; *Express Co. v. Caldwell*, 21 Wall. 264; *Ellis v. Am. Tel. Co.*, 13 Allen 226; *Croswell, Law of Electricity*, Secs. 493, 495.

In this aspect it is clearly binding upon the receiver, as well as upon the sender of the message, and in tort as well as in contract. The question is not one of assent, express or implied, but of simple notice. *Croswell, Law of Electr.*, Sec. 500; *Ellis v. Am. Tel. Co.*, 13 Allen 226; *Manier v. W. U. T. Co. (Tenn.)*, 29 S. W. Rep. 732; *Findlay v. W. U. T. Co.*, 64 Fed. Rep. 459.

One who has for years used the telegraph company's blanks, on which this regulation is conspicuously printed, is chargeable with notice of its existence; especially when by his own testimony he is shown to have known that the printed matter contained certain conditions intended to regulate the transaction of the company's business and the presentation of claims. In such case he can not avoid the

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effect of the rule by the simple statement that he never read it. *Oppenheimer v. U. S. Express Co.*, 69 Ill. 62; *Birney v. N. Y. & Wash. P. T. Co.*, 18 Md. 341; *Kiley v. W. U. T. Co.*, 109 N. Y. 236; *W. U. T. Co. v. Buchanan*, 35 Ind. 439; *Becker v. W. U. T. Co.*, 11 Neb. 87; *Womack v. W. U. T. Co.*, 58 Tex. 176; *W. U. T. Co. v. Carew*, 15 Mich. 536; *Field v. C. & R. I. R. Co.*, 71 Ill. 458; *M. D. & T. Co. v. Moore*, 88 Ill. 136.

This reasonable regulation, binding the receiver of the message by mere notice, was not complied with by a written claim presented in the name of a different person. *W. U. T. Co. v. Beck*, 58 Ill. App. 564.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The one question of general interest on this record being decided in favor of the appellee, makes the consideration of any other unnecessary.

We assume that the appellant, acting upon a message containing a mistake made by the appellee, has sustained damage, and that for such damage he had a right of action against the appellee. The mistake was in substituting "fifty" for "five" in the message, which was as follows: "Form No. 168.

THE WESTERN UNION TELEGRAPH COMPANY.
(Incorporated).

21,000 offices in America. Cable service to all the world.

This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for error or delays in transmission or delivery of unrepeatable messages, beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.

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This is an unrepeated message, and is delivered by request of the sender, under the conditions named above.

THOS. T. ECKERT, President and General Manager.

Number N 40	Sent by H	Rec'd by V K.	Check 8 paid
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Received at 10:13. Jan. 16, 1893

Dated Montgomery, Ala., 16.

To Wm. E. Webbe & Co., Chicago.

Buy fifty May wheat, limit loss two cents.

I. H. & J. C. HAAS.

Received by W. E. W."

For sixteen years the appellant had been trading on the Chicago Board of Trade, doing a great deal of business with and for persons out of Chicago, and the greater part of the necessary correspondence was by telegraph, under his personal attention. He knew that on the printed blanks were conditions but had never read them, nor heard them talked about. We must assume that, in fact, he was ignorant of the terms of the conditions, but being aware that there were conditions, his neglect to inform himself of the contents of the instruments which he had used for sixteen years, does not free him, in law, from a knowledge of such contents. Constructive notice, in cases to which it is applicable, is as effectual as actual notice. Oppenheimer v. U. S. Express Co., 69 Ill. 62; Field v. C. & R. I. R. R., 71 Ill. 458; Merchants D. & T. Co., 88 Ill. 136.

The appellant did not present to the appellee any claim "in writing within sixty days," as was required by the conditions.

This was fatal to his cause. We adopt the decision in Manier v. Western Union, 29 S. W. Rep. 732, 94 Tenn. 442, upon this point.

If the law applicable to the case be doubtful, it is better that a case furnishing an opportunity to settle so many questions, should go at once to the final tribunal.

The judgment, holding the appellee barred by neglect to give notice, is affirmed.

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Leo Rassieur v. Robert E. Jenkins, Assignee.

1. **ASSIGNMENT FOR THE BENEFIT OF CREDITORS—Claims to be Filed Within Three Months.**—Under the provisions of section 10 of the act concerning voluntary assignments, the failure of a creditor of an insolvent estate to exhibit his demand to the assignee within three months from the publication of notice to present claims, will exclude him from participating in the dividends until after the payment in full of all claims presented within that time and allowed by the County Court.

Proceedings Under the act Relating to Voluntary Assignments.—Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

JOHN H. HILL, attorney for appellant.

OTIS & GRAVES, attorneys for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the County Court of Cook County, disallowing an additional claim filed by the appellant against the Consolidated Ice Machine Company, insolvent, until all claims against said estate, presented within three months after the publication by the assignee of the notice to present claims against said estate were paid in full, and denying the petition of said appellant to stay any dividend to such creditors of said estate until the further order of the court.

The Consolidated Ice Machine Company made a general assignment for the benefit of creditors to Robert E. Jenkins, assignee, on October 14, 1890. Notice to present claims against the insolvent estate, as required by the statute, was published in the year 1892. The additional claim of the appellant, Leo Rassieur, was filed with said assignee on April 22, 1895, and by the assignee filed in the County Court of Cook County on September 19, 1895. The said claim, as declared by the claimant, was for the liability of

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the claimant on account of his having entered into certain bonds as surety for said Consolidated Ice Machine Company, in and by which said bonds the claimant, as surety, was bound to protect various parties against any and all suits of infringement of letters patent, and from any damages that might be incurred or result from such suits, which might arise on account of the use by said parties of the ice machine manufactured or sold by the said Consolidated Ice Machine Company to various parties.

On the same date that the assignee filed the said claim in the County Court, to wit, September 19, 1895, said assignee also filed his report and account therein, which showed a balance of cash on hand amounting to \$57,209.98, with other uncollected assets estimated at \$10,000. It being proposed to make another dividend among the creditors on the claims already allowed by the court, the appellant filed a petition in the County Court on November 30, 1895, *nunc pro tunc* as of October 8, 1895, setting forth the fact of his having filed his claim and the nature of said claim, and also reciting that in a recent decision the United States Circuit Court for the Northern District of Illinois had decided that the patent used by the Consolidated Ice Machine Company in the manufacture of their ice machines was an infringement of letters patent owned by the De La Vergne Refrigerating Machine Company, in a suit brought by the latter company for that purpose. The petition also set forth that while it was impossible for the petitioner Rassieur to state definitely the amount of damages which he would be obliged to pay on account of having become surety on the bonds referred to, in order to protect the purchasers of the machines manufactured and sold by the Consolidated Ice Machine Company, if such decision should be affirmed by the court of last resort, yet he believed that such damages would probably reach the sum of fifty thousand dollars. For the purpose of protecting himself against such loss the petitioner asked that no further dividends be declared until the rights and liabilities of the claimant on account of his suretyship on such bonds had been determined.

A hearing was had upon the claim and petition of appellant, and on January 9, 1896, the court denied the prayer of the petition to stay the payment of the dividends until the rights of the said Rassieur had been determined, and also disallowed his claim, and denied him the right to participate in the dividends of said estate until all the claims presented to and filed within three months after the first publication of said assignee to present claims against said estate were paid in full.

We are unable to find that the petition so filed by appellant names the said De La Vergne Company as one to whom it was liable on any bond.

By section 2 of the act concerning voluntary assignments, the assignee is required to give notice by publication and otherwise to all creditors to present their claims to him under oath within three months thereafter, and by section 10 of said statute it is provided:

"All creditors who shall not exhibit his, her or their claim within the term of three months from the publication of notice as aforesaid, shall not participate in the dividends until after the payment in full of all claims presented within said term and allowed by the County Court."

The contention of appellant is that such provision of the statute applies only to claims which are due, and does not act as a bar to contingent claims which are not and do not become due within the period limited, and he places reliance upon the case of *Suppiger v. Gruaz*, 137 Ill. 216, to support his contention.

It would seem that as to the particular question raised by the appellant, the decision in *Suppiger v. Gruaz* has been disapproved of by *Snydacker v. Swan Land Co.*, 154 Ill. 220.

At all events, we feel constrained to follow the last case, and hold that appellant was too late.

The judgment of the County Court is affirmed.

George H. Taylor v. The Indiana Paper Co.

1. **JUDGMENT IN BAR—What is not.**—A failure in a suit and consequent judgment for the defendant, in the State of Indiana, to recover in which there must have been proof of more consideration than is required in Illinois, is no bar to a suit for the same cause in the courts of this State.

Assumpsit, for money paid, etc. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed May 14, 1896.

TENNEY, McCONNELL & COFFEEN, attorneys for appellant.

GEO. W. SMITH, attorney for appellee; **R. O. HAWKINS**, of counsel.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The case of the appellant is that he and his wife conveyed to the appellee some real estate, the deed stating that "as part of the consideration of this conveyance, the grantee assumes and agrees to pay * * * a mortgage debt to Marie L. Chapin;" and because of the failure of the appellee to pay that debt he has been compelled to pay a considerable sum of money in settlement of it.

The defense upon which the court passed as matter of law, and instructed the jury to find for the appellee, is that before the appellant paid in settlement of the debt, Mrs. Chapin, at the request and expense of the appellant, herself sued the appellee to recover the debt which by the deed the appellee assumed, and was defeated upon the merits. The Circuit Court held that the judgment for the appellee in that suit was a bar to this. We will assume that the relation of the appellant to the former suit was such as to make the result in it binding upon him. *Cheney v. Patton*, 134 Ill. 422.

In the present case the appellant sued upon the theory that, solely by the acceptance of the deed, the appellee became bound to pay Mrs. Chapin. The declaration alleges no other consideration—nothing extrinsic to the deed itself. The former suit was in Indiana; and the complaint (under the code there) alleged, not that by the mere acceptance of the deed the appellee became liable to pay, but that in consideration of a variety of releases, and an assignment of a lease of other property, as well as in consideration of the deed, the appellee promised to pay Mrs. Chapin.

Now it is obvious that if the theory of this suit is correct, the mere production of the deed, with proof that the appellee accepted it, but did not pay Mrs. Chapin, and therefore the appellant was compelled to pay, is enough to entitle him to recover; and it is clear that a failure in any former suit, to recover in which there must have been proof of more consideration than is necessary to be proved in this, is no bar to this. Bigelow on Estop. 84; Freeman, Jud't, Sec. 259; Black, Jud't, Sec. 726.

If the position of the appellee could be maintained, that it was not necessary in the former suit to prove "each and every consideration that was alleged as a consideration for the agreement, but, on the contrary, the suit being upon and for the purpose of enforcing the agreement, it was only necessary to prove some one or more of the considerations alleged," then the former suit might be held to be a bar. But the law is the other way. In declaring upon a contract, where it is necessary to state a consideration at all, the whole must be stated, and of what is stated, the whole must be proved. 1 Ch. Pl. 229, Ed. 1844.

Thus, if less or more than the actual consideration be stated, there can be no recovery.

The Indiana judgment is therefore no bar to this suit, for the one reason that more proof was necessary to maintain that suit than will suffice in this. This being the only question before us, the judgment is reversed and the cause remanded.

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Benjamin J. Schiff, for use, etc., v. Supreme Lodge Order of Mutual Protection.

1. **PRACTICE—*Suits for the Use of Another.***—Where a person brings a suit for the use of another, it is of no concern to the defendant for the use of what person the suit is brought. A party entitled to sue need name no usee, and if he does, the words used in so doing are surplusage.

2. **ASSUMPSIT—*The Proper Form of Action Against Beneficiary Associations.***—Assumpsit will lie upon the breach of a promise whether the promise is to pay absolutely a sum of money or to do some other thing, and a promise by a beneficiary association to pay the amount of one assessment includes a promise to make the assessment.

3. **BENEFICIARY ASSOCIATIONS—*Construction of Conditions in By-Laws.***—Conditions of a by-law providing that the claims of beneficiaries shall not be paid until passed upon favorably by a subordinate lodge, and for appeals from one tribunal to another, and that members of the order and their beneficiaries shall have no right to seek redress in the courts until after the appeals mentioned for redress shall have been exhausted by them, are always most strictly construed, and a strained interpretation will be resorted to if necessary to avoid them.

4. **BILL OF EXCEPTIONS—*Certificate that it Contains all the Testimony.***—A certificate to a bill of exceptions, stating that it contains all the “testimony,” is equivalent to saying that it contains all the evidence.

Assumpsit, on a beneficiary certificate. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed May 14, 1896.

Booth & Booth, attorneys for appellant.

The point was raised in the lower court, and may be here again, that the proper remedy was in chancery, and the case of Benefit Ass'n v. Sears, 114 Ill. 108, relied upon to sustain the position. The Supreme Court in that case, where the certificate of membership contemplated the levying of an assessment for each death, did not decide that assumpsit would not lie, but that chancery might be resorted to as affording a more adequate remedy.

We cite upon this point, if raised, Metropolitan Mutual Ac. Ass'n v. Windover, 137 Ill. 417; Ring v. U. S. L. & A. Ass'n, 33 Ill. App. 168.

While the rules and by-laws of a benefit association will be generally upheld by the courts if they are reasonable and just, yet it is a well recognized principle of law that even a strained construction will be resorted to in order to avert a forfeiture or loss. Bacon, Ben. Soc., Secs. 86 and 352; N. W. Trav. Men's Ass'n v. Schauss, 148 Ill. 305; Railway Conductors' Ben. Ass'n v. Robinson, 147 Ill. 138.

WALKER, JUDD & HAWLEY, attorneys for appellee, contended that when the contract requires a member or his beneficiary to submit his claims to a tribunal of the society, and in case of an adverse decision on it, to appeal to certain appellate tribunals, he has no right to bring an action on the claim in the courts of the land until he has exhausted his remedies in the courts of the society. Where the by-laws provide that the decision of a subordinate tribunal shall be final, unless reversed on appeal by the supreme council, a member who is dissatisfied with the decision of the lower tribunal must, before resorting to the courts of the land, appeal to the supreme council of the society. Where the by-laws of a society provide that the board of trustees shall examine all claims of members for sick benefits, and, if found correct, shall order the same to be paid, a member may not resort to a suit at law for such benefits, without giving the board an opportunity to examine his claim. Citing Poultney v. Bachman, 31 Hun (N. Y.) 49; Lafond v. Deens, 81 N. Y. 508; White v. Brownell, 2 Daily 329; Harrington v. W. B. Association, 70 Ga. 340; Chamberlain v. Lincoln, 129 Mass. 70; Reed v. Insurance Co., 38 Mass. 575; Ellison v. Bignold, 2 Jac. & W. 505; McAlees v. Supreme Sitting (Penn.), 13 Atl. Rep. 755; Mentz v. Insurance Co., 79 Pa. St. 478; Brenenan v. Association, 3 W. & S. (Pa.), 218; Burns v. Union, 10 N. Y. Supp. 916; Supreme Sitting v. Stein, 120 Ind. 270; Supreme Council v. Forsinger, 125 Ind. 52; Anderson v. Supreme Council, 135 N. Y. 107; Woman's C. O. F. v. Keefe, 59 Ill. App. 390; Grand Lodge K. P. v. People ex rel., 60 Ill. App. 550.

Schiff v. Supreme Lodge Order Mut. Protection.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The bill of exceptions is criticised as not containing all the "evidence," because, instead of that word, "testimony" is used.

That distinction is a little too fine for every-day use. *Garrity v. Hamburger Co.*, 136 Ill. 499; *People v. Henckler*, 137 Ill. 580.

Two questions of law are presented by the appellee in justification of the direction of the court below to the jury to find for the defendant.

We can not know whether it was upon one or the other or both of those questions that the direction was made.

First. The charter says that among the objects of the appellee are "the relief and aid of the families, widows, orphans" of its deceased members. The certificate sued upon recites that Abraham Falk "has been accepted as a member of the order," and that "upon his death" the lodge will, if he has kept good his standing, pay "the amount of one assessment, not to exceed, however, the sum of two thousand dollars, to Benjamin J. Schiff, in trust for his children." Schiff sues for the use of Falk's children, and the appellee says it should be for the use of his own children.

The appellee has no concern with the use.

Schiff is the proper party to sue, and need name no use, and if he name one, the words are surplusage. *Tedrick v. Wells*, 152 Ill. 214; *Boone v. Stone*, 3 Gilm. 537.

Besides, the declared objects of the order correct the imperfect grammar of these Teutons. Falk had the care of his own children on his heart.

Second. The certificate sued upon provides that the rights of the beneficiary "shall be determined by the charter, constitution, laws, rules and regulations of the order in force at the time that the sum due hereunder is payable."

The by-laws provide that the claim of a beneficiary shall not be paid until it has been passed upon favorably by a subordinate lodge, and some higher officers; provides for

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appeals from one tribunal to another, and winds up with, "members of the order and their beneficiaries shall not have the right to seek redress in courts of record until after the appeals herein above mentioned for redress shall have been exhausted by them."

Conditions of that character "that keep the word of promise to our ear, and break it to our hope," of which it is safe to say that of those who take membership in benefit societies but a very small minority ever have any knowledge, are always most strictly construed, and "a strained interpretation will be resorted to if necessary to avoid" them. *Ry. Conductors' Ben. Ass'n v. Robinson*, 147 Ill. 138.

Here no such straining is needed. It is only necessary to adhere to the letter, without extending the condition to a case that may be within the spirit, but not within the letter of the condition. In words, it embraces only "members of the order and their beneficiaries."

The appellant is neither. He is a trustee for the beneficiaries, and sues upon a contract with himself. He might sue without alluding in his pleading to the uses.

The brief of the appellant anticipates that the appellee would object that the remedy was only in chancery, and cites *Metropolitan, etc., v. Windover*, 137 Ill. 417, and *Ring v. United States, etc.*, 33 Ill. App. 168, to show the contrary.

Those cases are not quite in point, and the question is not really before us; but it is a general rule that upon breach of a promise, *assumpsit* will lie whether the promise be to pay absolutely a sum of money, or to do some other thing.

A promise to pay "the amount of one assessment" includes a promise to make the assessment; and the presumption, unless the contrary be shown, would seem to be that such assessment would provide enough to pay the sum designated; and if the fact be otherwise, it is easy for the lodge to show it.

The judgment is reversed and the cause remanded.

W. E. Brown and James Pease v. James C. Owens.

1. **APPEAL**—*From Judgments of Dismissal*.—A dismissal of a case by a justice of the peace for want of prosecution is a judgment from which an appeal lies.

2. **JUDGMENT**—*Form of, in Inferior Courts*.—No particular form is required in the proceedings of an inferior court to render its order a judgment. It is sufficient if it is final and the party against whom it is rendered may be injured.

Injunctions.—Appeal from an interlocutory order, entered by the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1896. Reversed. Opinion filed May 14, 1896.

STATEMENT OF THE CASE.

This is an appeal from an interlocutory order for a temporary injunction. It appeared by the bill and stipulation as to facts that W. E. Brown, one of the appellants, commenced an action before a justice of the peace in February, 1893, against the appellee, James C. Owens. When the case was called for trial by the justice, the plaintiff was absent, and the defendant was present, and on the motion of the defendant the justice dismissed the case at the costs of the plaintiff. Within twenty days from the date of this judgment and order of dismissal, the plaintiff filed his appeal bond which was by the justice approved, and the case was transmitted to the County Court.

On the 28th of May, 1895, in the County Court of Cook County, the case was called for trial; a jury was impaneled, and a verdict rendered in favor of the plaintiff for \$199, the defendant not appearing at the trial. Judgment was entered upon the verdict for \$199 and costs. Afterward execution was issued upon the judgment, and it was to enjoin the enforcement of the judgment that this suit in chancery was brought in the Circuit Court. An application for an injunction was referred to a master, who made a report recommending that the application for temporary injunction be denied.

On the 25th of February, 1896, the Circuit Court of Cook County refused to confirm the master's report, sustaining the exceptions thereto, and entered an order allowing a temporary injunction upon the filing of a bond in the sum of \$500, conditioned as required by law. It is from the order allowing a temporary injunction that this appeal was taken.

BROWN & NORTON, attorneys for appellants.

B. W. VEIRS and M. P. HATHAWAY, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The transcript of the proceedings before the justice of the peace is as follows:

"EXHIBIT A.

Before E. T. Glennon, Justice of the Peace.

STATE OF ILLINOIS, } ss.
Cook County. }

W. E. Brown }
v. Assumpsit. Demand, \$200.
James C. Owens. }

March 9, 1893, summons ordered and issued to Constable Ralsten, returnable March 17, 1893, at one o'clock, P. M., and on the 14th day of March, 1893, returned by said constable indorsed as follows: 'Served the within by reading the same to the within named defendant, James C. Owens, in my county, this 14th day of March, 1893. John Ralsten, Constable.'

March 17, 1893, case called. Continued to March 22, 1893, at one o'clock, P. M.

March 22, 1893, case called at time set. Plaintiff appears not. Defendant present, and on defendant's motion case dismissed at plaintiff's costs."

It is insisted by appellee that the dismissal by the justice of the suit, at plaintiff's costs, was not a judgment from which an appeal could be taken, and that therefore the County Court obtained no jurisdiction by the appeal taken to it.

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The justice certainly rendered judgment against the plaintiff for costs, and from such judgment an appeal could be taken. The action of the justice was in accordance with Sec. 33 of the statute concerning justices and constables.

The 62d section of the act concerning justices of the peace, provides that appeals from judgments of justices of the peace shall be granted in all cases except on judgment confessed. A dismissal for want of prosecution is a judgment. *Reiman v. Ater*, 88 Ill. 299; *Cohen v. Moore*, 59 Ill. App. 396.

A much less degree of technicality and formality is required in the judgments of justices of the peace and other inferior courts than is exacted in respect to the judgments of the courts of record. In the case of judgments of the former order, it is generally held sufficient if the books and papers disclose with reasonable certainty that the judgment was in fact rendered for one of the parties, and for what amount, or even that a verdict was returned, on which no judgment was actually entered. 1 Black on Judgments, Sec. 115.

No particular form is required in the proceedings of an inferior court to render its order a judgment. It is sufficient if it is final, and the party may be injured. *Johnson v. Gillett*, 52 Ill. 358; *Brendon v. Shinkle*, 89 Ill. 604; *Madison Co. v. Rutz*, 63 Ill. 65.

The bond filed upon the appeal sufficiently identified the judgment entered by the justice from which the appeal was taken.

The order of the Circuit Court is reversed.

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S. P. Richards and Lizzie M. Richards v. The John Spry Lumber Company.

1. **APPELLATE COURT PRACTICE—*Insufficient Abstracts*.**—An abstract which only shows that objections to a master's report were taken, without showing what the report was, is insufficient.

Bill for Mechanic's Lien.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

WIGHT & WHITNEY, attorneys for appellants.

G. W. STANFORD, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was a petition for a mechanic's lien.

Mrs. Lizzie M. Richards, the owner of the property on which a lien was claimed, authorized her husband to make a contract with J. J. White & Co., to repair the same.

Answers to the petition having been filed and issue joined, the cause was referred to a master. We infer from objections filed by appellants to the master's report, that the master reported that appellee was entitled to a lien upon the premises for the sum of \$1,300.58.

No abstract of the master's report has been made; only objections to it are shown by the abstract.

It is impossible, from an examination of this abstract, to say that the objections should have been sustained, even if they had been presented to the court below in such manner as is required. The proper practice is described in *McManomy v. Walker*, 63 Ill. App. 259.

The court rendered a decree giving appellant a lien upon the premises of appellant Lizzie Richards for \$1,300.58.

The abstract as to the contents of the master's report contains only the following:

"Exceptions to the master's report filed November 11, 1895, beginning with the formal heading and closed with the formal ending required in a bill of exceptions, and the body of the exceptions, are in the same language and figures as those of the body of the objections filed before the master, and are given in this abstract of evidence of the pages of certified evidence as being from pages 83 to 113 inclusive, these exceptions being given in the certificate of evidence

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from the Circuit Court, being identical on pages 459 to 484, inclusive."

It is impossible to determine from this what the master's report was. We can not, for the purpose of reversing the decree of the Circuit Court, assume that the objections correctly state the contents of the master's report, even if they set it forth, which they do not.

Appellee has in his brief called attention to the insufficiency of the abstract, and insisted that the rules of this court in respect to abstracts be enforced. We have frequently passed upon this matter, and can not do otherwise than affirm the decree for want of a sufficient abstract.

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1. **SIDEWALKS—What is Not a Reasonable Use of.**—The moving of a safe weighing 1,400 pounds over a wooden sidewalk, raised several feet above the ground, is an extraordinary use, and not such as is contemplated by law. Municipalities are only required to keep such walks reasonably safe for use in the usual manner.

TRESPASS ON THE CASE, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Reversed. Opinion filed May 14, 1896.

STATEMENT OF THE CASE.

This was an action to recover for personal injuries occasioned by the breaking down of a plank sidewalk while an iron safe, weighing 1,400 pounds, was being moved over such walk.

The plaintiff was assisting the owner of the safe to move it, and was injured by the breaking of the walk.

The walk was in front of No. 91, 92d street, in what is known as South Chicago. The building and safe were owned by Nestor Johnson, who testified for the plaintiff, that about two or three months before the accident he

moved this safe from the building east to No. 91, over the same sidewalk which broke at the time of the accident in question. Johnson also testified that an election was held in his building a week before the accident, and that there was a large crowd of people around there at the election.

A city inspector testified that some two months before the accident he was under the walk, and saw a 2 x 4 timber that he should judge was rotten; that he made no report of this until after the accident; that after the accident he saw this timber, and it was not exactly rotten.

The plaintiff obtained a judgment for \$3,000.

To the following question the jury answered "yes:"

"Was the moving of the safe in question across the platform such a use of a sidewalk as sidewalks are ordinarily and reasonably used for?"

The court was asked, and refused to give, the following instruction:

"If the jury believe from the evidence that the platform on which Kohlhof was standing was strong enough and safe enough for people to walk along the same in the ordinary pursuits of life, they should find the defendant not guilty."

Roy O. West, Benjamin F. Richardson and Worth E. Taylor, attorneys for appellant.

The general rule is that under the powers usually conferred upon municipal corporations in respect to streets within their limits, it is their duty to keep them in a reasonably safe condition for use by travelers in the usual modes. Beach Pub. Corp., Sec. 1494; Dillon Munic. Corp., 4th Ed., Secs. 1008, 1019; City of Richmond v. Courtney, 32 Gratt. 792, 798; Town of Centerville v. Woods, 57 Ind. 192, 195; Raymond v. City of Lowell, 6 Cush. 524, 534; Johnson v. Haverhill, 35 N. H. 74; Wilson v. City of Wheeling, 19 W. Va. 324, 332; City of Emporia v. Schindling, 33 Kan. 485, 489; Erghott v. Mayor, etc., of N. Y., 96 N. Y. 264, 271; City of Wellington v. Gregson, 31 Kan. 99, 102; Pool v. Mayor, etc., of Jackson, 91 Tenn. 448; Cline v. Crescent City, etc., 41 La. Ann. 1031; City of Chicago v. Keefe, 114 Ill. 222.

The law affords no remedy for any injury resulting from

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a use of a highway other than the ordinary mode of traveling. When a highway is opened, the public are invited to travel upon it in such manner as accords with its general design and structure; they are not invited to use it for a purpose wholly and obviously unsuited to its strength, and which was never contemplated by its builders. *Megargee v. Philadelphia*, 153 Pa. St. 340; *McCormick v. Township of Washington*, 112 Pa. St. 185; *Clulow v. McClelland*, 151 Pa. St. 583; *Jackson v. Greenville*, 72 Miss. 220; *Sindlinger v. City of Kansas*, 126 Mo. 315; *Board of Commissioners, etc., v. Chipps*, 131 Ind. 56; *Blodgett v. Boston*, 8 Allen 237; *Stickney v. Salem*, 3 Allen 374; *Stackpole v. Healy*, 16 Mass. 33; *McCarthy v. Portland*, 67 Me. 167.

Sidewalk, a walk for foot passengers at the side of a street or road. *Black's Law Dictionary*; *Chaltiss v. Parker*, 11 Kan. 391.

The law does not contemplate any other use of sidewalks than for the passage of persons only. *City of Chicago v. Keefe*, 114 Ill. 230; *City of Lacon v. Page*, 48 Ill. 500; *City of Monmouth v. Sullivan*, 8 Ill. App. 50; *Gridley v. City of Bloomington*, 88 Ill. 556; *City of Chicago v. O'Brien*, 111 Ill. 536; *City of Bloomington v. Bay*, 42 Ill. 507; *Dillon Munic. Corp.* (4th Ed.), Sec. 1008.

The law contemplates no other use of the streets than for travelers. Any other permitted use is a license, and the municipality is not liable to a mere licensee. 24 *Albany Law Journal*, 464; *People v. Cunningham*, 1 Denio 524; *The King v. Russell*, 6 East 427; *Hawkins' Pleas of the Crown*, Ch. 32, Sec. 11; *Rex v. Jones*, 3 Camp. 230; *Commonwealth v. Passmore*, 1 S. and R. (Pa.) 219; *Nelson v. Godfrey*, 12 Ill. 23.

RITCHIE, ESHER & WOOLLEY, attorneys for appellee, contended that the specific duty resting upon every municipal corporation with regard to the streets under its control, is, that it shall exercise reasonable care to see that they are safe for lawful use, by any member of the public, for any of the purposes for which a public street is designed. *Jones, Negligence of Munic. Corp.*, Sec. 72.

The duty does not exist merely as to travelers, but to all persons lawfully in the streets. *McGuire v. Spence*, 91 N. Y. 303.

It exists toward a teamster, who, after unloading his wagon, stops to draw and drink water from a hydrant. *Duffy v. Dubuque*, 63 Ia. 171.

And toward every person who uses a sidewalk for any purpose for which sidewalks are designed. *Jones, Neg. Munic. Corp.*, Sec. 90.

Also to every one who is properly on a public street. *Indianapolis v. Emmelman*, 108 Ind. 534.

In *Gregory v. Adams*, 14 Gray (Mass.) 242, a bridge broke down under an elephant which weighed between five and six tons, and it was held that liability existed.

In *Yordy v. Marshall County*, 80 Ia. 407, plaintiff was moving a steam threshing outfit, weighing 8,250 pounds, across a country bridge, which broke down under the weight. The court below took the case from the jury, but on appeal, the Supreme Court of Iowa held that it should have been left to the jury to determine whether the county was guilty of negligence in not maintaining the bridge in a safe condition for the passage of such machinery.

In *Clear v. Pine Township*, 164 Pa. St. 543, a town was held liable for the breaking of a traction engine through a country bridge, the question whether such use of a bridge was reasonable and ordinary, being left to the jury.

And even in States where the only liability is held to be statutory, the word "traveler" in statutes, is held to include "every one who has occasion to pass over the highway for the purposes of business, convenience, or pleasure." *Duffy v. Dubuque*, 63 Ia. 175.

Under the Massachusetts statute, the highway is to be kept safe and convenient for all persons having occasion to pass over it, while engaged in any of the pursuits or duties of life. *Blodgett v. Boston*, 8 Allen, 240.

A traveler who gets out of his carriage and stops to pick raspberries by the wayside, is still a traveler. *Britton v. Cummington*, 107 Mass. 349.

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Children running and playing in the streets, are held travelers in Massachusetts. *Gulline v. Lowell*, 144 Mass. 496; *Bliss v. South Hadley*, 145 Mass. 94.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

In *Dillon on Municipal Corporations*, Vol. 2, Sec. 1019, the rule as to the obligation of cities in respect to streets is thus declared :

“It is sufficient, we think, if the streets (which include sidewalks and bridges thereon) are in a reasonably safe condition for travel in the ordinary modes, by night as well as by day; and whether they are so or not is a practical question, to be determined in each case by its particular circumstances.”

In *City of Chicago v. Keefe*, 114 Ill. 222, upon a petition for rehearing, the court say: “A sidewalk is for the passage of persons only, and we have not had in contemplation any use of it otherwise.”

Notwithstanding the verdict of the jury, we think that all persons of average intelligence know that the moving of a safe weighing 1,400 pounds over a wooden sidewalk raised several feet above the ground, is extraordinary. Houses, horses and carriages are sometimes moyed over sidewalks; but such walks are not designed for such purposes; they are made for the use of pedestrians; are constructed with a view to the safety and convenience of pedestrians using the walk in an ordinary manner, and are not designed or held out as capable of supporting heavy freights.

Cities are required to keep the streets reasonably safe for use in the usual manner. *Beach on Public Corporations*, Sec. 1494; *City of Lacon v. Page*, 48 Ill. 499; *Megargee v. Philadelphia*, 153 Pa. St. 340; *McCormick v. Township of Washington*, 112 Pa. St. 185; *Clulow v. McClelland*, 151 Pa. St. 583; *Sindlinger v. City of Kansas*, 126 Mo. 315; *Board of Commissioners, etc., v. Chipps*, 131 Ind. 56; *Stickney v. Salem*, 3 Allen, 374; *Stackpole v. Healy*, 16 Mass. 33.

In effect, the contention of appellee is that the incorpo-

rated cities and villages of this State are each obliged to keep all of their sidewalks in a safe condition for the moving of safes thereon; that is, for a use so extraordinary that it may reasonably be said that there is not one rod in ten thousand of such walk over which, as often as once a year a safe is moved.

We are asked to declare that it is the duty of cities and villages to keep all sidewalks at all times reasonably secure against such extraordinary use and strain. Such is not one of the obligations of municipal bodies.

The judgment of the Superior Court is reversed.

A judgment will be here entered on a finding of facts.

Bernard Kunkel, an infant, etc., v. The City of Chicago.

1. **NEW TRIALS—Absence of Witnesses.**—A party can not have a new trial because of the absence of witnesses, after taking his chances before the jury upon such evidence as he had.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

OSCAR E. LEINEN, JOHN MAYO PALMER and ROBERTSON PALMER, attorneys for appellants.

ROY O. WEST, BENJAMIN F. RICHOLSON and WORTH E. CAYLOR, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

A six year old boy was hurt in a hole in the sidewalk through the negligence of the city.

See this case reported in 37 Ill. App. 325.

It may be conceded that on the last trial the court erred in regard to instructions touching the right of the appellee

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to recover at all, but not as to any touching the measure of damages. The jury gave \$250.

The appellee's arm was broken, but there is no evidence of permanent injury, not even of pain, except by inference that pain must ensue from an arm being broken. He incurred no expense.

The damages do not appear inadequate; the jury awarded what seemed to them, and seems to us, a fair compensation for the injury. The appellee asked for a new trial upon the ground that he did not expect the case would be tried in so little time as the trial occupied, and therefore did not have his witnesses all present, and the court would not wait. The court was not bound to wait, nor can a plaintiff have a new trial because of the absence of witnesses, after taking his chance before the jury upon such evidence as he had. Calender Co. v. Badger, 30 Ill. App. 314; Dueber Watch Co. v. Lapp, 35 Ill. App. 372.

The speculation from which, by the affidavit of the mother it appears that she expected so much, has failed, but no injustice has been done, and the judgment is affirmed.

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National Bank of America v. The National Bank of Illinois.

1. **CHECKS—Holder of—Right to Sue the Drawee.**—The holder of a check may sue the bank upon which it is drawn, if the account of the maker with the bank is good, and the holder has a good title to the check.

2. **SAME—Bona Fide Holder.**—A person who receives a check from his debtor without notice of any defect in its title, is a *bona fide* holder and gets a good title.

Assumpsit, on a bank check. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

WALKER, JUDD & HAWLEY, attorneys for appellant.

MORAN, KRAUS & MAYER, attorneys for appellee.

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MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Both these banks are at Chicago. A firm of private bankers, Herman Schaffner & Co., kept an account with the appellee, and it was overdrawn more than the amount here in controversy.

June 2, 1893, after banking hours, the firm deposited with the appellee the check as follows:

"No. 2,100.

CHICAGO, June 2, 1893.

NATIONAL BANK OF AMERICA AT CHICAGO.

Pay to the order of C. B. Beach one thousand dollars.

E. KELLOGG BEACH."

Indorsed:

"Pay to the order of H. & D. S. Greenebaum.

C. B. BEACH,

H. & D. S. GREENEBAUM,

HERMAN SCHAFFNER & COMPANY."

The appellee knew nothing about the check except what appeared upon it; and credited it to the account of the firm.

In fact it was given to be used for a certain purpose, which had failed, and there was no consideration between any of the parties whose names appear upon it, either as maker, payee or indorser.

June 2, 1893, was the last day the firm of Herman Schaffner & Co. did business; next morning they did not open.

The account of the maker was good with the appellant, and he stopped the payment of the check. When the appellant refused to pay the check, the appellee charged it back to Schaffner & Co.

We regard this last act as mere bookkeeping.

The appellee has kept, and keeps the check, and this suit is upon it. The law of this State permits the holder of a check to sue the bank on which it is drawn, if the account of the maker with the bank is good, and the holder has a good title to the check. That is so well settled that controversy about it has ceased. *American Exchange Bank v. Chicago National Bank*, 131 Ill. 547.

O'Conner v. Nolan.

The appellee was a *bona fide* holder.

Receiving the check from its debtor, without notice of any defect in the title, gave it a good title. *Russell v. Had-duck*, 3 Gilm. 233.

The judgment in favor of the appellee for the amount of the check, with interest, is affirmed.

Katherine O'Conner v. Daniel Nolan.

1. **DAMAGES—Breach of Contract.**—Damages, however proximately they follow the breach of a contract, can not be recovered unless, under the circumstances, they are a natural result of the breach.

2. **SAME—What are not Natural Results of the Breach.**—The plaintiff, who was employed at the stock yards, entered into a contract to buy a saloon, and gave up his employment. Afterward the defendant refused to perform her contract of sale, and, in consequence, the plaintiff remained idle for six months. In an action to recover damages, it was held that his inability to obtain employment was not a natural result of the breach of the contract.

Assumpsit, breach of contract. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed May 14, 1896.

BURTON & REICHMANN, attorneys for appellant.

MASTERSON & HAFT, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action to recover damages for an alleged breach of contract to sell the fixtures and lease of a saloon. Appellee claimed, and has evidently recovered, wages he might have earned at the stock yards, had he not, in consequence of the bargain, given up his place, and thus, as he says, despite his efforts, remained idle for six months.

Appellee pleaded and also gave evidence that at the time

the bargain was made, he told appellant that he would give up his place at the stock yards and look after the saloon.

The general rule that in an action for breach of contract a party can recover the damages which naturally result from the act complained of, is well understood; but there has been much discussion and many decisions, not entirely harmonious, as to the recovery of special damages because of the existence of special circumstances.

Damages, however proximately they follow a breach of contract, can not be recovered unless under the circumstances they were a natural result of the breach; that is, in order that compensation for injury may be recovered, the injury must be such as, according to the usual course of events, might, under like circumstances, have been expected. Sedgwick on Damages, Vol. 1, Sec. 142.

The case of *Hadley v. Boxendale*, 26 Eng. L. and Eq. 396, has been so much commented on, both in England and this country, that Sedgwick, in a note to the eighth edition of his work on damages, says that the great body of cases since decided involving the measure of damages for breach of contract, resolve themselves into a continuous commentary upon it. This case is the leading one to which resort is had for an extension of the claim for special damages, that is, unusual damages resulting from the existence of unusual circumstances, a knowledge of which was possessed by the contracting parties when the contract was made.

It will be observed, however, that the commentaries upon *Hadley v. Boxendale* are rather upon what was said in deciding the case, than what was necessarily decided by the judgment. The special damages claimed in that case, loss of profits that might have been made by a mill, were not allowed.

It is, adopting the language used in *Hadley v. Boxendale*, only the damages which would ordinarily flow from a breach under the circumstances, known to the parties at the time the contract was made, that can be recovered under allegation and proof of special damages. The subject is discussed at considerable length in Sedgwick on Damages, Vol. 1, Sec. 142 to 169.

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We have recently held, in *Consumers' Ice Co. v. Jenkins*, 58 Ill. App. 519, that expected profits can not be recovered in an action for failure to supply machinery as promised.

In the present case, we do not deem the inability of the plaintiff to, for six months, obtain employment, a natural consequence of the circumstances known to the parties when this contract was made. That the plaintiff did, because of his bargain, throw up his engagement, is true; but neither such abandonment of his situation, nor consequent illness, was a natural result of his purchase of appellant's saloon, or of the refusal of appellant to perform her agreement.

The utmost that appellant knew was, that appellee contemplated giving up his situation at the stock yards, if he purchased the saloon. Appellee was not bound to any one, to, in case of purchase of the saloon, give up his situation. He might have kept his place and also the saloon. Appellee had no sub-contract, the performance of which depended upon his obtaining the saloon. The special damages to him awarded, he was not entitled to, and the judgment must be reversed. Reversed and remanded.

**Michael Ruane v. The Lake Shore & Michigan Southern
Railway Company.**

64	352
94	187
194	1188

1. **NEGLIGENCE—*On the Part of the Plaintiff, Prevents a Recovery.***—A flagman on a railroad crossing, whose duty it is to watch for trains and to give signals, etc., can not recover for any injury by a train which it was his duty to see and signal as it approached the crossing.

2. **RAILROADS—*Statutory Signals.***—The statutory signals to be given by trains on approaching street crossings are designed for the benefit of the public and not for employes of the company.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at March term, 1896. Affirmed. Opinion filed May 14, 1896.

STATEMENT OF THE CASE.

This was an action to recover for personal injuries sustained by appellant while in the employment of appellee as a flagman at 51st street in the city of Chicago.

The plaintiff testified:

"My duties consisted of signaling trains coming from all directions, block them if there was any danger, and if there was any people in the way I was supposed to signal them to keep out of the way, keep from one place to another and stop them, and if I seen any train coming, if it was in any danger, I was supposed to signal it not to come, and if there was no danger, I was supposed to signal them to come ahead. I was familiar with what signals to give trains. I recollect the night of October 18, 1893; a few minutes before the accident happened my lamp went out and I had to go up to the tower to light it; I had no matches and no place to go if I didn't go to the tower. At the time I came to work there that is the place I got my lamp. That is the directions I got—to go up and get my lamp when evening came and signal every train, and a few minutes before this train came along I went up to the tower when my lamp went out; it went out once or twice and I went up to light it. When I left the tower I took the direction of going south. The stairs lead south down. When on the tower I had a view of the track. I looked up and down and I seen a train coming from the south—coming from the north, going south.

Q. Did you or not see any coming from the south?
A. No sir; I didn't see any at the time.

Q. When you reached the bottom of the stairs, then what direction did you take? A. Well, I took to the north; then I see a train coming from the south, going to the north, and I got on the crossing to give it a signal to come ahead.

The Court: You say you saw a train coming from the south toward the north? A. I saw a train coming from the north. I seen a train coming from the north, going south. I was about two feet from the tower. I should

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judge the track on which this locomotive afterward came is about four feet from the outside of the tower. After I got off the tower I walked twenty-five or thirty feet north before I signaled the train. I stopped within a few feet of the tower on the sidewalk—the crossing sidewalk going east and west. The crossing runs east and west. I was standing on the crossing. The train that was coming from the north I signaled to come ahead. Had the lamp in my hand. I signaled them to come ahead. When I turned the lamp, signaling the train coming from the north, the train came from the south—I didn't see it—and hit me on the arm; it hit me on the hand and knocked me down between the two trains. There was no whistle blown; if there was a whistle blown I would not hear it. The train was running about forty or forty-five miles an hour, I should judge. When the train hit me I was standing to the south of the south sidewalk, my back was toward the south and my face was toward the north. Up to the time the train struck me I had not seen the train at all. When the train struck me I was standing on the sidewalk of the crossing. The sidewalk on which I was standing lay to the north of the tower house, about two feet or so. It is about four or five feet, I guess, probably more, from the south end of the tower to the end of the stairs. I couldn't tell the total distance.

Q. Between what tracks at that point was the proper position for the flagman when you was flagging them? A. I had no proper place; the flagman is supposed to be—my rules—he is supposed to be all over the crossing; he is supposed to be right at the street, on the street, on the crossing. Yes, it would do for him to flag standing alongside of the tower; that is, the sidewalk—south of the sidewalk; there is no south sidewalk. I was standing on sidewalk north of tower. I was standing on south sidewalk of 47th street. I judge I could see down the track about four or five blocks, anyway south, about the same north. The train which struck me was one it was my duty to flag at that time. It was my instructions to flag all trains at that crossing—Lake Shore trains, Rock Island trains, and all trains

that passed there. When I was stationed on duty as a flagman I looked up and down the track. That was my duty, to watch for trains that were coming there either way. I was expected to perform that duty as a part of my employment.

The Court: At the time you were struck, how far were you from the west rail? A. I should judge about three feet. I think so. It is possibly nine or ten, or probably eight feet (I didn't measure it), between the westermost rail of the track on which the train was moving to the eastermost rail of the next track to the west. Eight feet between the two; between the nearest rails.

The Court: Do you not understand it now? How far is the distance from the west rail to the east rail of the track that is next to it? A. That is about eight feet or so, I think.

Q. Now we want the distance from the west rail to the east rail of the second track. A. Of the one that struck me?

Q. Yes, from the west rail of the track on which you were struck—on which the engine was running that struck you; the distance from that to the east rail of the second track west. A. Well, I should judge—you mean the rail that the engine was going on, one of them would be on the west and the eastern rail of the other track would be—that would be about fourteen or fifteen feet away. The track on which train was moving that hit me consisted of two rails; one was west of the other. The cars and engine projected over the rail, about two feet, two and a half beyond the rail."

The evidence tended to show that the train which struck appellant was running at a rate of speed prohibited by the ordinances of the city, and did not ring a bell or blow a whistle in accordance with requirements of the law.

The court directed the jury to return a verdict for the defendant.

EDWARD A. MORSE, JOHN MAYO PALMER and ROBERTSON PALMER, attorneys for appellant, contended that where there

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is any evidence which, with all legitimate inferences fairly deducible therefrom, tends to support the case made by the plaintiff's declaration, he is entitled, as matter of law and of right, to take the verdict of the jury upon such evidence; and the court can not lawfully withdraw the case from the consideration of the jury. *N. Y., C. & St. L. Ry. v. Luebeck*, 157 Ill. 604; *Blanchard v. L. S. & M. S. Ry.*, 126 Ill. 420.

The ultimate fact in the case was whether the defendant was guilty of negligence as alleged in any of the counts of the plaintiff's declaration. Whether the evidence fully establishes a fact of this character is not to be determined as matter of law, but is one peculiarly within the province of the jury. *Pullman Car Co. v. Laack*, 143 Ill. 251.

GARDNER & MCFADON, attorneys for appellee.

The appellant should not recover in this case because he failed to see what it was his duty to see and failed to give the notice he was stationed on the street to give. His own neglect of duty in the premises makes him guilty of such contributory negligence that he can not recover. Beach on Contributory Neg., Sec. 190; *Clark v. B. & A. Ry. Co.*, 128 Mass. 4; *R. R. Co. v. Crawford* (Ala. 1890), 8 Southern Rep. 245.

A flagman is bound to know as one of his duties when a train which he has to signal will arrive at the place where the performance of his duties requires him to do the signaling. *R. R. Co. v. Clough*, 34 Ill. App. 130; *R. R. Co. v. Clough*, 134 Ill. 592; *Chicago & St. L. Ry. v. Hutchinson*, 120 Ill. 187; *C. & A. Ry. v. Adler*, 129 Ill. 335.

And as a corollary of this position a flagman is bound to keep out of the way of the trains which he has to signal.

The appellant being employed to stand in a dangerous place for the purpose of signaling trains he assumes the risks of accident from the trains he was to signal, as one of the risks of his position. Beach on Cont. Neg., Sec. 360; *Kennedy v. Manhattan Ry. Co.*, 33 Hun (N. Y.) 457; *Berkfitz v. Humphreys*, 145 U. S. 418.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant was employed to keep watch for the approach of all trains, to signal them to stop if necessary, and thus to guard the public and the trains of appellee. In this position he owed a duty to the public as well as to appellee. There is nothing tending to show that it was necessary for him to stand upon the track, or so near it, that he would be struck by a passing train.

Whether trains were on time, or whether they complied with statutory regulations as to ringing bells, etc., made no difference as to his duties, which were to be watchful and to give necessary warning at all times. Chicago, St. L. & P. Ry. Co. v. Hutchinson, 120 Ill. 587-593; C., R. I. & P. Ry. Co. v. Clough, 134 Ill. 586-592; Same, 33 Ill. App. 130; C. & A. Ry. Co. v. Allen, 129 Ill. 335.

Appellant can not rely on a violation of the statute by appellee to enable him to recover. The statute is designed for the benefit of the public and not for employes of the railway whose duty it is at all times and under all circumstances to protect the public at the crossing in question. Gibson v. Leonard, 143 Ill. 182-196.

Appellant failed to see a train it was his duty to see, and failed to give a notice he was employed to give; but for such negligence on his part he would not have been injured. He therefore can not recover for injuries, the consequence of his own omission of duty. Clark v. B. & A. Ry. Co., 128 Mass. 4.

The judgment of the Circuit Court is affirmed.

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Louise L. Fergus, John B. Fergus, and Horace A. Goodrich, Trustee, v. Chicago Sash and Door Co., John Wallace and Michael Burke.

1. **MECHANIC'S LIEN—Affirmative Relief on an Answer.**—In a proceeding for a mechanic's lien no cross-petition is necessary. If a defendant is entitled to a lien he can have it upon an answer.

Fergus v. Chicago Sash and Door Co.

2. **EQUITY PRACTICE—Defendant Not Entitled to Notice After Default.**—After a defendant has suffered a petition to be taken as confessed he is not entitled to notice of the taking of testimony before the master, nor without taking exceptions can he question the conclusions of fact reached.

3. **SAME—Rights of Co-defendants.**—If parties defendant desire to question the rights of other defendants they must do so in the court below.

4. **WAIVER—Of Errors Not Discussed.**—When an error assigned is not noticed in the brief of the parties assigning it, it is waived.

Mechanic's Lien.—Error to Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

SMITH & BARTON, attorneys for plaintiffs in error.

PEASE & McEWEN and GEORGE D. ANTHONY, attorneys for defendants in error.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

January 14, 1895, the Sash and Door company filed a petition for a mechanic's lien upon premises of Louise L. Fergus, under a contract with her by her husband as her agent, and alleging that Goodrich, Wallace and Burke had, or claimed, some interest in the premises. The plaintiffs in error were duly served with summons, but paid no attention to the suit, and the petition was taken as confessed against them. Wallace and Burke were not served, but appeared, and by answer set up their own claim for a mechanic's lien.

No cross-petition was necessary; if they were entitled to a lien, they could have it under an answer. Thielman v. Carr, 75 Ill. 385.

And the plaintiffs in error, having suffered the petition to be taken as confessed, were not entitled to any notice of the taking of testimony before the master, nor, without taking exceptions to his report—as they did not—can they question the conclusions of fact which he reported. Moore v. Titman, 33 Ill. 358.

By the petition which they were summoned to answer they had notice that Wallace and Burke were parties defendant, and therefore privileged to present and enforce their rights, if they had any. The plaintiffs in error, if they wished to question the claims of Wallace and Burke, should have attended to the case below.

All of the errors assigned, except the twelfth and thirteenth, are as to the findings in the decree, which the plaintiffs in error can not question after default. The thirteenth is that the decree does not contain sufficient findings, which not being noticed in the brief, is waived. Cook v. Moulton, 59 Ill. App. 428.

The twelfth, that the court erred in granting relief to Wallace and Burke without notice to the plaintiffs in error, has been already answered.

The decree is affirmed.

Herman E. Dick v. Globe National Bank.

1. When the abstract does not show that the execution of a note is put in issue under section 34 of the Practice Act no question arises as to its validity.

Assumpsit, on promissory note. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed May 14, 1896.

ALBRIGHT & MARTZ, attorneys for appellant.

HENRY W. FREEMAN, attorney for appellee; JAMES L. HIGH, of counsel.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant gave his promissory note as accommodation to F. W. Griffin for \$600, payable ninety days after

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date. It was dated February 3, 1895. Griffin changed the date to 13 by writing in 1 before the 3, and indorsed the note to the bank, and the bank has recovered a judgment upon it.

In the fore part of April, 1895, the appellant knew that Griffin was found out as a felon.

The note, as altered, became due May 14–17. The appellant wrote the following letter:

“BALLOU ENGRAVING MACHINE COMPANY,
65 Nassau Street,
NEW YORK, May 14, 1895.

Globe National Bank, Chicago, Illinois.

GENTLEMEN: I have been expecting to start for Chicago every day for three weeks, but I have been laid up here with bronchitis, which keeps me in pretty close. I will leave on Saturday, stop one day in Detroit, and see you the first of the week. Please hold note until I return, and oblige,

Truly yours,

H. E. DICK.”

Without anything shown in the abstract putting in issue the execution of the note, under Sec. 34, Practice Act, no question arises as to the validity of the note, and therefore all instructions asked, attacking the note, appear to have been rightfully refused. *Chapman v. Chapman*, 27 Ill. App. 487; S. C., 129 Ill. 386.

The judgment is affirmed.

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Board of Education, Chicago, Impleaded with Lucius B. Otis v. August Frank et al.

1. **VALUES—*In Fixing, What is not to be Considered.***—It has never been held, even in cases of valuation of property for the assessment of taxes, to be a good ground of relief by bill in equity, that the property of some other tax payer has not been assessed high enough, and there is no reason why the scope of equitable jurisdiction should be enlarged in this regard when the valuation grows out of a private contract.

2. **RENTAL VALUES—*Methods of Determining Values Fixed by Contract.***—Where parties by contract fix a method of determining the value of property as a basis for fixing its rental and such method has been pursued, neither party can obtain a standing in equity to be relieved of his contract.

3. **SAME—*Over-valuation—The Remedy.***—In order that a party in such a case may be entitled to relief in equity, there must be joined to the alleged resulting injury or over-valuation either illegality in the appointment of the appraisers, or in the methods of procedure by them, or as to matters taken into consideration by them, or a violation in some way of the provision of the lease concerning the making of the valuations, or something which amounts to a fraud or mistake other than a mere error of judgment.

4. **APPEALS—*From Orders of a Party's Own Procuring.***—An injunction was ordered by an *ex parte* indorsement on the bill by the judge of the court upon the recommendation of a master in chancery, directing that the writ issue on giving a bond, which was done, and the writ issued. No order was entered of record at the time, but after the party, against whom the writ was issued procured the entry of a formal order, in conformity with that indorsed upon the bill, *nunc pro tunc*, and upon his motion an appeal was allowed *nunc pro tunc*. *Held*, that this was not such an order of the party's own procuring, as prevented him from taking an appeal therefrom.

Bill for Injunction.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded with directions. Opinion filed May 14, 1896.

DONALD L. MORRILL, attorney for appellant; LORIN C. COLLINS, JR., of counsel.

MORAN, KRAUS & MAYER, attorneys for appellees.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a bill filed by appellees for an injunction against the appellant Board of Education, and one Lucius B. Otis, from declaring a forfeiture of a certain lease of school lands, and from enforcing payment of certain ground rent, and the appeal is from an interlocutory order of injunction granted upon such bill.

The premises in question consist of four adjoining lots,

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each being 24 feet wide and 120 feet deep, viz.: lots 35, 36, 37 and 38 in block 142 in the School Section Addition to Chicago, situated at the northwest corner of State and Monroe streets, in said city, and fronting in the aggregate ninety-six feet on State street and 120 feet on Monroe street.

Of said four lots, the said Lucius B. Otis was the lessee of the said Board of Education under a separate lease of each lot for a term of fifty years from May 8, 1880, at a fixed annual rental for the first five years of said term. The leases provided for a method of appraising the true cash value of the premises, exclusive of improvements thereon, for every succeeding five years of said term, and that six per centum of such several valuations should be the annual rental thereof for said several five year periods.

A dispute and suit in equity occurred over the first of such valuations made in 1885, and resulted in the execution between the Board of Education and Otis on June 15, 1888, of certain supplemental leases, whereby the term of each of said original leases was extended to May 8, 1895, upon annual rentals agreed upon for the first period of ten years from May 8, 1885, and thereafter to be determined by the calculation of the same rate per centum upon valuations to be made every ten years instead of every five years, as provided in the original leases. A different method for the appointment of appraisers was also provided for by said supplemental leases.

The valuations agreed upon for the ten year period ending May 8, 1895, were as follows: For lot 35, \$67,200; lot 36, \$67,200; lot 37, \$72,000; lot 38, \$96,000.

The appraisers who made the valuation in 1895, for the ten year period to run from May 8, 1895, appraised the lots as follows: Lot 35, \$150,000; lot 36, \$160,000; lot 37, \$200,000; lot 38, \$240,000.

Before this last appraisal was made, and on February 1, 1894, the appellees leased from said Otis the said four lots and the improvements thereon, for a term of fifteen years, beginning May 1, 1895, and in consideration of such leasing to them covenanted to pay as part of the rental thereof all

such ground rent as by the terms of said leases to Otis, he, the said Otis, should be bound to pay to the Board of Education.

The method of appointment of appraisers which was provided for by said supplemental leases, was that the Board of Education should appoint one; any judge holding the Circuit Court of the United States for the Northern District of Illinois should appoint another, and the judge of the Probate Court of Cook County should appoint the third, and it was provided that any two of such appraisers should have the power to make the appraisement.

The qualifications of such persons were merely that each one should be a discreet male resident of the city of Chicago, not interested as lessee or mortgagee of school property in said city, and their duty was to determine the true cash value of the demised land, exclusive of improvements thereon.

It was also provided that the persons appointed, or either of them, should not be the representatives of either party to the leases.

The bill attacks the fitness or qualification of the appraiser named by the Board of Education, on the ground that he had been, a short time prior to his appointment, a member of the Board of Education, and its president, and had been actively identified with the interests of said board for a long time; that his interests and inclinations were wholly on the side of the board, and that he was in effect a representative of the board at the time of his appointment to such an extent that he was not and could not be a discreet and impartial appraiser as between the board and the lessee, Otis; and that so being, his appointment was null and void, and rendered the said appraisal, participated in by him, null and void.

The appointment of the second appraiser was made by Judge Grosscup, a district judge of the said United States Court, and although it is not contended that he might not, by virtue of his office, lawfully hold the Circuit Court of the United States in said district, yet it is insisted by the bill

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that as a matter of fact he was not holding said Circuit Court when he made such appointment, but was holding said District Court; and it is contended that on account thereof the appointment of said second appraiser—he being appointed a successor to one who was previously appointed under the same circumstances as to the judge and the court he was holding, and who had not died, resigned, or been removed, but had simply refused to act—was null and void under the provisions of the supplemental leases, with reference to the person and capacity in which he was at the time acting of the judge who should make the appointment, and the power to appoint a successor only in case of the death, resignation or removal of the one first appointed.

The third appraiser appointed by the judge of the Probate Court is in no way attacked.

The contention that the appraiser named by the Board of Education was an improper appointee, within the provisions of the supplemental leases, does not seem to merit much discussion.

The bill makes no allegation that he was, when appointed, a member of the board, or a representative of the board in any capacity, nor that he was a lessee or mortgagee of school property. Other interests or inclinations which he might have as a citizen and resident of Chicago are not sufficient to disqualify him, and we must regard him as a fit and proper appointee, for anything that is alleged to the contrary.

Perhaps because of the provisions of the leases that any two of the appointed appraisers might make the valuations, nothing need be said about the sufficiency of the appointment of the second appraiser made by Judge Grosscup, further than to remark that the objection is at best but a technical one, and it is a well understood principle that a mere technical objection does not afford a standing in equity.

There is no charge made, either in the bill or in argument, against the personal fitness and qualification of the person so appointed, and we do not think the mere technicality

urged can be taken advantage of in equity by the appellees. All the other objections that the bill presents finally resolve themselves into the charge that the valuations that were made by the appraisers of the lots in question were unfair, oppressive and excessive, and therefore void.

We can not stop to notice in detail the various matters that are alleged tending to show the excessiveness complained of. The fact that other property that was appraised by the same appraisers, appointed in like manner under the provisions of other like leases, was valued relatively lower than the lots in question, and that the Board of Education, by negotiation with other lessees of other school property, accepted a relatively lower valuation for such other property, affords no ground for relief to the appellees. It has never been held, even in cases of valuation of property for the assessment of taxes, that it was good ground for relief by bill in equity, that some other tax payer was not assessed enough.

And we perceive no reason why the scope of equitable jurisdiction should be enlarged in that regard, where the valuation to be fixed grows out of private contract. Where parties contract together as to methods of determining the value of property as a basis for fixing its rental, and such methods are pursued, neither side may obtain a standing in equity to be relieved from his bargain. At all events neither party should be entitled to equitable consideration on the ground of an over-valuation without at least an affirmative allegation in his bill of what a true valuation of the property is.

There is no such allegation in this bill. The appellees claim an excessive valuation, but they do not allege with any certainty what the property is worth. The lease provides that the appraisers shall determine the true cash value of the property. They have made such valuation. The appellees dispute its correctness, but they do not allege what the value should be. While we do not decide that if they had so alleged they would have made a case on the face of their bill, we instance the lack of such an allegation as a

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conclusive reason why they have not brought themselves within any possible range of equity.

We apprehend that if the appraisers were lawfully appointed, and made their valuations in accordance with the terms of the contracts of lease, the mere fact that their valuations were excessive, or, in other words, that they had merely erred in judgment, would not furnish ground for relief in equity.

In order that a party, in such a case, may be entitled to relief in equity, there must be joined to the alleged resulting injury or over-valuation, either illegality in the appointment of the appraisers, or in the methods of procedure pursued by them, or as to matters taken into consideration by them, or a violation in some way of the provisions of the leases concerning the making of the valuations, or something which shall amount to fraud, or mistake other than mere error of judgment.

We have already seen that no valid objection in equity can, in our opinion, be taken to the appraisers, or to the method of their appointment, and without stopping to mention in detail such matters as are well alleged concerning their methods of procedure, and the matters considered by them in arriving at their valuations, our opinion is that nothing so alleged constitutes a violation of either the letter or the spirit of the leases.

There remains to be considered the point made by appellees that the order of injunction appealed from was procured by the appellant Board of Education, and that said board could not appeal from an order of its own procurement.

The bill was filed and summons issued December 30, 1895, and the summons, together with the writ of injunction, were served upon the Board of Education on the next day, December 31st.

The writ of injunction was ordered by an *ex parte* endorsement made on the bill by one of the Circuit Court judges upon the recommendation of a master in chancery, and directed that the writ issue upon the complainants giving a \$10,000 bond.

That bond was executed December 31st, and filed the same day, and the writ was thereupon issued.

No order of injunction having been entered of record in said cause, the appellant Board of Education upon the motion of its solicitors procured a formal order therefor in conformity with that which had been indorsed on the bill, to be entered on January 25, 1896, *nunc pro tunc* as of December 31, 1895, and thereupon this appeal was allowed *nunc pro tunc* as of said December 31st.

The writ having issued in pursuance of the order of the judge indorsed on the bill, as it might under the provisions of our statute, we regard it as entirely proper and not at all as interfering with the right of appeal that the party prejudiced by the writ should be permitted upon his own motion to have the order which had already been made upon the application of the other party, duly spread upon the record of the court, so that the record should show the order sought to be appealed from, independently of the vicissitudes to which the bill itself might be subject as a part of the movable files of the court.

Viewed in the light of the whole record, the certificate of evidence which states that the cause came on for hearing upon the motion of defendants (appellants) that an injunction order be entered pursuant to the prayer of the bill, must be interpreted and read as meaning not that an injunction be ordered, but that an injunction order as already made, be entered of record.

We regard the order as one technically proper, though perhaps not absolutely necessary to be entered as a preliminary to the appeal; and the right of appeal being one that is favored in the law of this State, we should not give to an order so entered an interpretation which would contravene that right, where from the entire record it is manifest that the order was procured to be entered for the express purpose of facilitating an appeal. See *Mecham v. McKay*, 37 Cal. 154; *Brewer v. Connecticut*, 9 Ohio 189.

The order of injunction will be reversed and the cause remanded, with directions to the Circuit Court to dissolve the

Barnum & Richardson Mfg. Co. v. Wagner.

injunction, and it is so ordered. Reversed and remanded with directions.

MR. JUSTICE WATERMAN.

I am of the opinion that the appeal should be dismissed.

In this State the files of the court are in chancery a part of the record. A court of record speaks only by its record; that is, to determine what it has done, recourse must be had to its record. An order for an injunction was entered by writing the same upon the bill December 30, 1895. January 25, 1896, upon motion of the defendants it was ordered that an injunction issue *nunc pro tunc* as of December 31, 1895. An injunction should never be issued *nunc pro tunc*.

An injunction can not be retroactive, nor can an order issued January 25, 1896, make acts done December 31, 1895, disobedience, and hence the actor subject to punishment for contempt.

Appellants prayed an appeal, not from the injunction order made in December, 1895, which was served on appellees December 31, 1895, but prayed and were allowed an appeal only from the injunction order "entered (herein) on the 25th day of January, A. D. 1896, *nunc pro tunc* as of the 31st day of December, A. D. 1895," which order was entered upon the motion of appellants.

64	375
68	608

Barnum and Richardson Manufacturing Company v. Gottlieb Wagner.

64	375
107	1 16

1. **PRESUMPTIONS—*Workmen on the Premises of Another.***—The presence of a workman upon the premises of another is, presumably, directly or indirectly, at the instance of the owner, and omitting to state specifically in a declaration that he was there upon the request or license of the owner is, at most, a technical defect cured by verdict.

2. **INSTRUCTIONS—*Manner of Presenting.***—The custom of stating that one set of instructions is given for the defendant, and the other for the plaintiff is wrong, as tending to reduce the instructions from declarations of law by the court, to the grade of arguments by the parties.

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3. NEGLIGENCE—*Warning, a Recognition of Danger.*—The fact that a warning is given is of itself a recognition that the dropping of the bottom of an iron furnace is fraught with danger to those in the vicinity.

4. NEW TRIALS—*Power of the Appellate Court.*—Even if the damages are not excessive, the Appellate Court has no authority to direct that the defendant shall not have a new trial, if the plaintiff will not remit part.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

MASON BROTHERS, attorneys for appellant.

All instructions should emanate from court; hence error in notifying jury that certain instructions were given in appellee's behalf. *Aneals v. People*, 134 Ill. 401, 416.

C. A. FITCH, attorney for appellee.

An averment that a certain act or line of conduct is a duty is superfluous and useless; all that is required in this respect, is a sufficient statement of facts from which the law will imply a duty. *West Chicago Street R. R. Co. v. Colt*, 50 Ill. App. 640.

A defective statement of a good cause of action will be cured after verdict. *C. & E. I. R. R. Co. v. Hines*, 132 Ill. 161; *Compton v. The People*, 86 Ill. 176.

Every man owes to every other the duty of due care to avoid injury. *Cooley on Torts* (2d Ed.), 631.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee was laying brick into a wall some dozen feet, more or less, from a cupola furnace in a foundry conducted by the appellant. His presence at such work upon its premises was, presumably, directly or indirectly, at its instance. *City of Chicago v. Johnson*, 53 Ill. 91.

Omitting to state specifically that he was there by request or license of the appellee was, at most, a technical defect in the declaration, cured by verdict. *Matson v. Swanson*, 131 Ill. 255.

Barnum & Richardson Mfg. Co. v. Wagner.

The brief for the appellant makes some gentle criticism of the rulings of the court upon evidence during the trial, but there is nothing that calls for comment upon that part of the case. The manner of presenting the instructions to the jury has lately been discovered to be—as no doubt it is—wrong.

To my own knowledge, it passed without comment for twenty-five years.

That manner was in stating that one set of instructions was given on the part of the plaintiff, and the other on the part of the defendant. Such a mode tends to reduce the instructions from declarations of law by the court, to the grade of arguments by the parties, yet we can not treat the manner as an error for which to reverse the judgment; especially in a case in which all observation and experience teaches that upon the evidence the only different verdict to be expected would be one for a larger amount.

In the working of the furnace, after the contents are melted, the molten iron is first drawn off, and then the bottom of the furnace is dropped, which permits the slag and contents of the furnace other than iron to fall. Before this is done, the surroundings are made wet by sprinkling from a hose, and when the bottom is about to be dropped a warning is given.

On the day of the accident, the warning was by calling out “look out!” immediately before the drop, and when the contents of the furnace fell, an explosion followed, which threw a portion of the contents upon the appellee, and burned him. He sued, and has recovered \$500.

The fact that a warning is given is, of itself, a recognition of the further fact that the dropping of the bottom of the furnace is followed by danger to those in the vicinity. As the foreman of the foundry testified, when the workman drops the bottom “he takes to his heels, and gets away as soon as he can.” No explosion had ever occurred before this one, but it was commonly understood that if water stood under the furnace, an explosion might follow the dropping of the bottom.

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The workman who dropped the bottom testified that no water did so stand, but the facts of the explosion and previous wetting were before the jury, as well as the further fact that no effectual warning of danger was given to the appellee.

There is no question of fellow-servants in the case. The damages can not be said to be exorbitant.

The minor irregularities complained of in the brief of the appellant could have had no influence upon the result, and the judgment is affirmed.

The appellee assigns as a cross-error, that the verdict being for \$1,000, the court ordered that it be reduced to \$500, for which judgment was entered, and he excepted. This was error. *McCausland v. Wonderly*, 56 Ill. 410.

But the assignment of error does not pray a reversal of the judgment, but that the verdict "be reinstated and judgment entered thereon." He does want a new trial, and we have no authority to direct that the appellant shall not have a new trial if the appellee will not remit.

64 378
64 615
64 378
68 494

John Angus et al. v. Orr and Lockett Hardware Co.

1. **SHORT CAUSE CALENDAR—*Sufficient Affidavit.***—The following affidavit—"William K. Lowrey, being first duly sworn, deposes and says that he is the attorney for the plaintiff in the above entitled suit now pending in this court, and that he verily believes that the trial of said suit will not occupy more than one hour's time"—is sufficient under the short cause calendar act.

Assumpsit, on promissory notes. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellants.

WILLIAM K. LOWREY, attorney for appellee.

Angus v. Orr & Lockett Hardware Co.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is a case for grammarians rather than for lawyers. The abstract informs us that the declaration consisted of "two special counts on two notes and the consolidated common counts," and that the plea was the general issue. There is nothing else in the abstract, or in the briefs on either side from which we can find out what the suit was about, or what the judgment was for. *Shields v. Brown*, 64 Ill. App. 259.

The briefs on both sides argue but the single question of what is the true grammatical construction of the following affidavit for placing the cause upon the short cause calendar of the Circuit Court.

"William K. Lowrey, being first duly sworn, deposes and says that he is the attorney for the plaintiff in the above entitled suit now pending in this court, and that he verily believes that the trial of said suit will not occupy more than one hour's time.

WILLIAM K. LOWREY."

Appellants say, in their brief, that under said affidavit the cause was improperly placed upon the short cause calendar, and was tried over their objections, and their argument upon the question is as follows:

"This affidavit is in its fair construction an affidavit that plaintiff verily believes, etc., which, if true, might better be sworn to by the plaintiff.

And in view of the recent opinion of this court, (*King v. Pardridge*, 60 Ill. App. 475,) that a pronoun grammatically refers to the next preceding noun, we respectfully submit that this case was improperly tried on said short cause calendar, and we therefore ask that the judgment herein be reversed."

The case referred to was one wherein the sufficiency of the verification to a bill in chancery was involved, and in a separate opinion by the presiding justice of the court he said that "a pronoun grammatically refers to the last appropriate antecedent."

The writer of this opinion learned a few years ago that modern grammar was not what he thought it to be, and rather than incur an increase of knowledge in that direction, he prefers to let the appellee's counsel speak for himself in answer to appellants. He occupies a good deal more space in answering than appellants' counsel do in making the proposition, but he is thorough, and if what he says shall add to grammatical understanding in some quarters, it may serve almost as useful a purpose as would a contribution to the stock of legal information.

Counsel for appellee says: "It is not believed that the authority relied upon by counsel for appellants in King v. Pardridge applies to this case in any particular. The mind of counsel for appellants appears to have been confused by the opinion in said case rendered by the honorable presiding judge, but counsel eliminates from that opinion the one word which, in this instance, is essential. The concluding sentence of the opinion is, 'a pronoun grammatically refers to the last appropriate antecedent.' In the affidavit under discussion the pronoun 'he,' being a personal pronoun, does not necessarily refer to its nearest antecedent. The rule varies in this particular as to personal pronouns. A relative pronoun refers to its nearest antecedent. A personal pronoun does not necessarily refer to its nearest antecedent. This I believe to be a well known and established rule of the English language. Mason & Green's English Grammar, London, Art., 'Pronouns.'

But another argument may be urged against the construction sought to be placed upon this affidavit by counsel for appellants. It is of record that the plaintiff below is a corporation. If counsel for appellants be correct in his contention, this court is called upon to read into the affidavit a grammatical error in the use of the word 'he.' The pronoun 'he' can not possibly grammatically refer to a corporation, and the plaintiff in this suit below is a corporation. Therefore, to be accurate, the word 'it' should have been used in place of the word 'he,' and I respectfully submit that had 'it' been used, the affidavit would have been non-

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sensical and open to criticism on other grounds. The language of the short cause calendar act with reference to the affidavit, is as follows :

‘Upon the plaintiff, his agent or attorney, in any suit at law pending in any court of record, filing an affidavit that he verily believes the trial of said suit will not occupy more than one hour’s time, and upon ten days previous notice to the defendant, his agent or attorney, said suit shall be placed by the clerk upon said short cause calendar.’ Starr & Curtis’ Statutes, Vol. 3, Chap. 110, Sec. 120.

It will be seen from this that the power is conferred upon the attorney to make the affidavit, but in any case, be it plaintiff, agent of plaintiff, or attorney for plaintiff who makes the affidavit, the requirement is that affiant verily believes. Now in parsing or analyzing the affidavit what do we find ? What is the predicate of the neuter verb ‘is’ ? Is it the word ‘attorney’ ? To say so is to be nonsensical. The entire clause—the ‘attorney for the plaintiff in the above entitled cause,’ etc., is the predicate. And the word ‘plaintiff’ is only a qualifying word in that clause. The second clause of the affidavit must be similarly construed.

Suppose the affidavit in this case had read : ‘William K. Lowrey, being first duly sworn, deposes and says that he is the attorney for the plaintiff in the above entitled suit, who owns a yellow dog, and that he verily, etc.’ According to contention of counsel for appellant, the pronoun ‘he’ must refer, not to affiant, nor yet to plaintiff, but to the word ‘dog,’ a proposition which needs only to be stated to show its absurdity. Nor am I arguing in a jesting mood; for the illustration given suggested itself to the learned trial judge upon the motion of the defendant below to strike the cause from the short cause calendar.

The affidavit stands as made. This court must interpret it in accordance with such grammatical laws as will give it meaning. It can not mean grammatically that a corporation verily believes, and it can not mean that logically. The ‘he’ must refer to the only person who can reasonably be expected to swear to the contents of that affidavit. The

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context shows but one such person, to wit, the affiant, William K. Lowrey. Both grammar and the authorities of 'English, pure and undefiled,' sustain the contention that the form used in this affidavit is in accordance with the best known rules of construction of the English language. Let me refer your honors to that famous and delightful essay of Addison wherein he tells of his visit to Sir Roger de Coverly. Speaking of Sir Roger's chaplain, Addison writes:

'He heartily loves Sir Roger, and knows that he is very much in the old knight's esteem, so that he lives in the family rather as a relation than a dependent.'

Now in this case shall we say the second 'he' refers to 'Sir Roger' as its antecedent, and the third 'he' refers to the 'Old Knight'? Such a construction is ridiculous and is not what the model of graceful English intended to say, nor is it what he does say.

Again, in the same essay, speaking now of Sir Roger, he says:

'As I was walking with him last night, he asked me how I liked the good man whom I have just mentioned, and without staying for my answer, told me he was afraid of being insulted with Latin and Greek at his own table,' etc.

Shall we, under counsel's understanding of English, insist that Addison meant by 'the good man,' the chaplain 'was afraid,' etc., at his, the chaplain's table, when we knew the honest and devout old gentleman was a pensioner on the bounty of Sir Roger? (Spectator No. 106, Monday, July 2, 1711. Addison's works.)

In the same essay, and all through Addison's writings, occur similar passages to confound counsel and refute his position. I might cite Lamb, Macauley, Irving, John Addington Simonds, Andrew Lang and Stevenson. Their writings are full of just such grammatical constructions, but I take it enough has been said."

I concur in the grammar of appellee's counsel, and add, only, that the court is of the opinion that the pronoun "he" preceding the words "verily believes," refers to the affiant Lowrey, and not to the appellee (plaintiff) corporation, and

South Chicago City Ry. Co. v. Workman.

therefore that the affidavit was sufficient and the cause was properly placed and heard upon the short cause calendar. There being no other matter upon which question is made, the judgment of the Circuit Court is affirmed.

South Chicago City Ry. Co. v. Benjamin H. Workman,
for the use of Jennie Moore.

1. **GARNISHMENT—Amount of Recovery.**—An attaching creditor can not be allowed to recover from the garnishee more than the debtor himself could have recovered.
2. **SET-OFF—In Actions for Wages.**—In an action for wages, the defendant may set off damages sustained by him through the negligence of the plaintiff, in his employment, and may have judgment for a balance due him.
3. **SAME—Unliquidated Damages.**—The fact that damages are unliquidated is no obstacle to setting them off when they accrue out of the same subject-matter as the demand against which they are offered.

Attachment Proceedings.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed June 1, 1896.

OSBORN & LYNDE, attorneys for appellant.

CARPENTER BROTHERS, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This case was tried by the court without a jury, and the question of law in the case is whether the court erred upon propositions of law presented to it by the appellant. As to the pertinency of such propositions on appeal to one of the Appellate Courts, see *Smith v. Dauel*, 29 Ill. App. 290, *Kimball v. Doggett*, 62 Ill. App. 525, and *West Chicago Park Commissioners v. Kincade*, 64 Ill. App. 113.

The case was an attachment commenced before a justice by Jennie Moore against the appellee, the appellant being summoned as garnishee upon alleged indebtedness to the appellee. He had been in the service of the appellant as a motorman (electric car), and if there was no valid set-off the appellant owed him \$35.35 for unpaid wages.

The appellant claimed that he negligently ran his car against another in front, and that the damages to the cars by the collision were \$73.42.

The statute, Ch. 52, S. 13, is:

"Every garnishee shall be allowed to retain or deduct out of the property, effects or credits in his hands all demands against the plaintiff and all demands against the defendant of which he could have availed himself if he had not been summoned as garnishee, * * * and he shall be liable for the balance only after all mutual demands between himself and plaintiff and defendant are adjusted, not including unliquidated damages for wrongs and injuries."

That statute is no more than the law was before it was passed. An attaching creditor was never, in this State (with some statutory exceptions), allowed to recover from a garnishee what the debtor could not himself recover. *Chatroop v. Borgard*, 40 Ill. App. 279.

The last eight words of the section mean only that the same rule which has always been applied to section 30 of the practice act shall apply to garnishment. *Edwards v. Todd*, 1 Scam. 462; *Hawks v. Laads*, 3 Gilm. 227.

Now, "in an action for wages, defendant may set off damages occasioned him by negligence of the plaintiff in his employment, and may have judgment for any balance due him." 14 Am. & Eng. Ency. of Law, 782; *McEwen v. Kerfoot*, 37 Ill. 530; *Lake Superior, etc. v. Clapp*, 50 Ill. App. 301; *Hartshorn v. Kinsman*, 16 Ill. App. 555.

We lay out of the case, as being no more than the law implies, that the appellee, in a written contract with the appellant, had authorized the taking out of his "pay any damages for injury caused by" his carelessness.

The fact that damages are unliquidated is no obstacle to

Fitzgerald v. Hager.

setting them off when they accrue out of the same subject-matter as the demand against which they are offered. The case cited from 16 Ill. App. is very full to that proposition.

The appellant offered two propositions of law, both of which being refused, it excepted. One contains the gist of both, and is as follows:

‘1. The South Chicago City Railway Company, garnishee in this proceeding, is entitled to set off against any sums that may be due from it to said workman, for wages as a motorman in its employ, any sums due from said workman to it at the time he left its employ, because of damage to property of said South Chicago City Railway Company, caused by his negligence in the operation of his car.’

That refusal was error.

Had the court acted upon the doctrine thus expressed, the finding, instead of being against the appellant, might have been for it.

The judgment is reversed and the cause remanded.

William Fitzgerald v. Frederick Hager, Adm'r of Theodore Karls.

1. **APPELLATE COURT PRACTICE—*Instructions not Shown by the Record.***—Where the instructions given to the jury are not shown by the record, the only question to be determined is whether the evidence warrants the verdict.

Assumpsit, for professional services. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

W. P. BLACK, attorney for appellant.

DOLITTLE, TOLMAN & POLLASKY, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee is administrator of Theodore Karls, late an architect in Chicago, who commenced this suit in his life-

time to recover for professional services alleged to have been rendered by him to the appellant. The evidence was conflicting; by consent the court instructed the jury orally; how is not shown; and therefore the only question that could be in the case is whether the evidence warrants the verdict.

The most deliberate and solemn piece of evidence in the case, is an extract from a bill in chancery, filed and sworn to by the appellant, which accords with the verdict, and it is impossible for this court to say that the jury ought not to have believed it.

The judgment is affirmed.

Harmony Company v. Albert Rauch.

1. **BURDEN OF PROOF—*Breach of Conditions in a Lease.***—In an action for rent where the defense is that the landlord failed to keep the provisions of the lease in relation to heating the premises, it is sufficient for the defendant to show only a breach of such provisions in order to maintain his defense, and not that for that reason he was obliged to vacate the premises.

2. **POSSESSION—*Retention of Keys not Constructive Possession.***—The mere retention of keys where one claims to have been evicted from the premises, does not amount to a retaining of constructive possession of the premises. Such an act is a matter of evidence that does not amount to a presumption.

Assumpsit, for rent. Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed June 1, 1896.

ERNEST SAUNDERS, attorney for appellant; WILLIAM G. ERNST, of counsel.

BULKLEY, GRAY & MORE, attorneys for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.
The appellee recovered a judgment for \$150 against the appellant for one month's rent of certain premises leased for

Harmony Co. v. Rauch.

manufacturing purposes. The lease was in writing and contained a provision that the appellee should keep the premises heated to a minimum of seventy degrees for ten hours each working day, and furnished with power equal to ten horse power on said days, for a term of two years commencing on January 1, 1892.

After occupying the premises for about twenty-one months the appellant vacated the premises because, as it claims, of the failure of appellee to keep his covenants concerning heat and power.

We refrain from discussing the merits of the controversy because of having to reverse the judgment for errors in the instructions given for appellee.

The first instruction, after stating the issue, proceeded thus (as shown by the abstract):

“Upon this issue, court instructs as matter of law, burden of proof on defendant, and unless defendant has proved by preponderance of evidence that plaintiff failed to furnish heat and power called for by lease, and for that reason defendant could not use premises and was therefore obliged to vacate same, and did for that reason vacate same, verdict should be for plaintiff for amount shown by evidence.”

The instruction went altogether too far. It was not incumbent on the defendant to show that because of the appellee's failure to furnish heat and power the appellant could not use the premises, and was obliged to vacate them.

The fifth and sixth instructions (as abstracted), were as follows:

“5. Court instructs the jury that, under terms of lease in evidence, plaintiff did not covenant to furnish heat and power upon national holidays, or during such periods as plaintiff was necessarily closed down for purpose of making repairs; and burden of proof is on defendant to prove, first, failure to furnish heat and power according to the terms of lease; second, that such failure to furnish heat and power was not upon national holidays or during periods when it became necessary to shut down to make repairs.

6. Court instructs jury that, in order to justify defendant in abandoning premises described in lease in evidence, it must appear by preponderance of evidence that plaintiff refused to furnish heat and power as provided in lease, with intention of depriving defendant, as tenant, of enjoyment of premises, or of some part thereof; and unless you believe, from evidence, that act of plaintiff in not furnishing heat and power called for in lease—if you believe from evidence that such heat and power was not so furnished—was willful, and done with intention on his part that tenant should not continue to hold premises, and to thereby lose beneficial use of same, then, as matter of law, such act would not constitute eviction, and tenant would not be justified in abandoning premises."

As to the fifth instruction, the burden of proof was not upon the appellant to show that the failure to furnish heat and power was not during periods when it was necessary to shut down for repairs.

That was a subject peculiarly within the knowledge of the appellee, and was for him to prove in excuse of a shutting down that might be proved against him.

As to the sixth instruction, that unless the depriving of the appellant of heat and power was the willful and intentional act of the appellee for the purpose of driving appellant from the premises the appellant was not justified in abandoning the premises, does not state the law. What would or would not justify an abandonment did not depend upon the willful intention of the appellee to drive appellant out, but did depend upon what he did or neglected to do, the result of which might or might not justify an abandonment, quite irrespective of appellee's intention or willfulness.

Such acts or neglects, if arising from accident or inability, would as effectually justify abandonment as if they were willful and intentional.

There was also a technical error in the third instruction with reference to the effect of retaining the keys of leased premises.

Highley v. Deane.

The mere retention of keys where one claims to have been evicted from premises, does not amount to a retaining of constructive possession of the premises, any more than would a mere acceptance of the keys by the landlord, amount to a waiver by him of a claim for rent. Such an act is a matter of evidence, but does not of itself make a presumption of law.

It is probable that there are other errors in the instructions, but if so, that may be avoided on another trial. Those that we have pointed out are the most material ones, and because of them the judgment will be reversed and the cause remanded.

Gomer E. Highley v. Royal E. Deane, George G. Brooks,
Berkey & Gay Furniture Company, Leopold
Schlesinger and David Mayer.

64	389
108	266
64	389
108	270

1. **Costs—Of a Receiver Appointed without Cause.**—Where a party, without probable cause, obtains the appointment of a receiver, he should be made to pay the entire expense thus by him created.

Mortgage Foreclosure.—Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDERS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

STATEMENT OF THE CASE.

In the spring of 1893, Bramhall, Deane & Company, Schlesinger & Mayer, and the Berkey & Gay Furniture Company sold and delivered household goods to the Calumet Association to equip its hotel in Chicago, known as the Rossmore Hotel. The purchaser executed to each of these firms chattel mortgages on the goods sold by each, to secure payment of the purchase price thereof. These liens, except that of Schlesinger & Mayer, were kept in force of record until May 1, 1894. That of Schlesinger & Mayer had been

allowed to expire prior thereto. In March, 1894, the Calumet Association executed and delivered to Gomer E. Highley two judgment notes, payable on demand after date, aggregating \$6,000; on April 30, 1894, said association executed a chattel mortgage on all the household goods in said hotel, which was filed for record on May 1st, at 9 a. m. On May 1st the association executed to Berkey & Gay Furniture Company, and to Bramhall, Deane & Company, chattel mortgages for the indebtedness then due each on the property covered by their former mortgages respectively. These instruments, duly acknowledged, were filed for record respectively on May 1, 1894, at 3 p. m., and on May 3d, following.

Deeming themselves insecure, Bramhall, Deane & Company, on or about the 29th day of June, 1894, took out a writ of replevin for the property described in their mortgage; whereupon Gomer E. Highley filed in said court his bill to foreclose his mortgage and secured a preliminary injunction restraining Bramhall, Deane & Company and James H. Gilbert, sheriff, from removing or further interfering with said property, which was duly served upon the said James H. Gilbert July 5th. The complainant afterward filed an amended bill praying foreclosure of his mortgage, and an injunction, and making additional parties defendant. Bramhall, Deane & Company, Schlesinger & Mayer, Berkey & Gay Furniture Company, James H. Gilbert, sheriff, and all parties in interest, were made defendants, and brought within the jurisdiction of the court. The first three only are concerned in this appeal. Each of these filed an answer setting up its or their own mortgage, charged want of consideration for complainant's notes and mortgage, charged that they were executed with a fraudulent intent common to both the complainant and the Calumet Association to defraud creditors of said association, and averred priority and validity to their own mortgages. Each of said defendants filed a cross-bill in which they make the same charges contained in their said answers, set up their own mortgages and the consideration therefor, and pray that the same be foreclosed,

Highley v. Deane.

and that the property described in each be delivered up to them respectively, or sold, and the proceeds paid over to them.

July 9, 1894, on the application of the Berkey & Gray Furniture Company, the court appointed the Chicago Title & Trust Company receiver for the property covered by its mortgage, whereupon, at the request of complainant, the other parties not objecting, the court extended the receivership to cover all the property described in the bill then filed. The said Trust Company qualified as receiver, and thenceforth acted as such until discharged by the court below on the day when its final decree was entered.

The court, upon hearing, found that the mortgage of complainant was fraudulent and void as to the cross-complainants; that the mortgage asserted by each cross-complainant was valid and a prior lien to that of complainant; dismissed complainant's bill; decreed that the receiver pay to each of the said cross-complainants the proceeds of the sale of property mortgaged to each respectively; that complainant pay the costs of the proceeding, and costs and expenses of the receiver; and that complainant pay to each as a deficiency the receiver's charges and expenses by it paid out of the proceeds of sale of said property, as follows:

To Berkey & Gay Furniture Company	\$337.53
To Bramhall, Deane & Company	75.01
To Schlesinger & Mayer	87.52

and that each have execution therefor; whereupon complainant moved to set aside the said decree so far as it allowed receiver's costs against said complainant. At the September term following, the court overruled said motion; and said defendant, having applied to the court to set aside the order overruling the said motion, the court at said term denied said motion and allowed complainant's prayer for appeal, which was accordingly taken to the Appellate Court.

GEORGE S. STEERE, attorney for appellant; EDWARD C. FRITH, of counsel.

FLOWER, SMITH & MUSGRAVE, attorneys for Berkey & Gay Furniture Company.

MORAN, KRAUS & MAYER, attorneys for Schlesinger & Mayer, appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Notwithstanding what is urged to the effect that appellant has not appealed from the decree, and that the order appealed from is not one that is appealable, we deem it best to dispose of this case upon the merits.

Appellant urges that as the receiver was not appointed at his instance, although his claim was properly found to be devoid of equity, he ought not to be charged with the expense of the receivership. What appellant did do, was to file a bill to foreclose a mortgage, afterward found to be fraudulent, and upon this bill he obtained an injunction restraining Bramhall, Deane & Company from removing property upon which it had a valid mortgage.

This made the appointment of a receiver for such property proper, if not necessary. A receiver for this property having been appointed, appellant applied for and obtained an extension of the receivership to all the property described in the various mortgages, of which that of Bramhall, Deane & Company was but a small part.

Appellant was, before a receiver was appointed, liable upon the bond given to obtain an injunction against Bramhall, Deane & Company.

Appellant, by the filing of his bill, the injunction and receivership obtained by him, caused the expense of the receivership, and has properly been ordered to pay the same. But for the conduct of appellant, no receiver would, so far as appears, have been necessary.

Where a party, without probable cause, obtains the appointment of a receiver, he should be made to pay the entire expense thus by him created. Einstein v. Lewis, 54 Ill. App. 520; Myers v. Frankenthal et al., 55 Ill. App. 390.

The order of the Circuit Court is affirmed.

Levin v. Chicago Gas Light & Coke Co.

Louis A. Levin v. Chicago Gas Light & Coke Company, et al.

64	393
67	23
64	393
100	472

1. **ILLEGAL TRUSTS—Relief in Equity.**—Equity will leave one who had been engaged in illegal conduct and seeks relief from its results, in the position where it finds him. He can not be relieved unless he himself is free from participation in the fraud.

2. **PLEADINGS—To be Construed Most Strongly Against the Pleader.**—Such construction will be given to the pleading of a party as is most unfavorable to him.

3. **COMBINATIONS BY CORPORATIONS—Who is Estopped from Complaining.**—A stockholder who has participated in illegal acts and conspiracies, and partaken of the fruits thereof, may not tear down the structure he has helped to rear, simply because he did not know that he had been engaged in illegality and conspiracy.

4. **ULTRA VIRES—Laches by Stockholders.**—To entitle stockholders to the summary interference of a court, they must apply so recently after the doing of the acts complained of, that the court may stop or undo the wrong to them without doing equal or greater wrong to some other person, or, in other words, if a stockholder wants protection against the consequences of an *ultra vires* act, he must ask for it with sufficient promptness to enable the court to do justice to him without doing injustice to others.

5. **LACHES—By Stockholder.**—Shareholders can not lie by, sanctioning, or by their silence at least, acquiescing in, an arrangement which is *ultra vires* of the company to which they belong, watching the result; if it be favorable and profitable to themselves to abide by it, and insist on its validity, but if it prove unfavorable and disastrous, then to institute proceedings to set it aside.

Bill for Relief.—Appeal from the Circuit Court of Cook County; the Hon. O. H. HORTON, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

ALFRED E. HAWES, attorney for appellant, contended that a dissenting stockholder may enjoin the *ultra vires* acts of the directors or majority of stockholders. Cherokee Ins. Co. v. Jones, 52 Ga. 276; Munt v. Shrewsbury Ry. Co., 13 Beav. 1; Wiswall v. Greenville R. R. Co., 3 Jones' Eq. 183; Maniwell v. Midland R. R. Co., 1 Hem. and M. 130; Central R. R. v. Collins, 40 Ga. 582; Salomons v. Laing, 12 Beav. 339; Hartford v. Creswell, 5 Hill 383; Ashton v. Burbank, 2 Dill 435; Cook on Stock, etc., 682 *et seq.*

The smallness of the stockholder's interest will not prevent his instituting a stockholder's suit to remedy a corporate wrong. Cook on Stockholders, Sec. 735.

And the purchaser of stock has the same right to bring the suit that his transferee had. Winsor v. Bailey, 55 N. H. 218; Seaton v. Grant, L. R., 2 Ch., 459, and cases cited in Cook, 735-6; Bloxam v. Met. Ry. Co., L. R., 3 Ch. 337; Du Pont v. N. P. Ry. Co., 18 Fed. Rep. 467; Atchison R. R. Co. v. Fletcher, 10 Pac. Rep. 597; Ervin v. Oregon Ry. & Nav. Co., 35 Hun 544; 28 Hun 269; Young v. Drake, 8 Hun 61; Kingman v. Rome, etc., Ry. 30 Hun 73; Cook on Stockholders, 736, 737; Ford v. Chicago Milk Shippers, 155 Ill. 166.

An action by a shareholder against a corporation to restrain it from a contemplated transaction which is *ultra vires*, may be maintained by a stockholder, and must be sanctioned by the court, although all the other stockholders of the corporation are willing to assent to and affirm the proposed course of action; but in a case of evident expediency, and where there is no attempt to go beyond the power conferred, a court of equity will not be swift to grant the stringent relief of a preliminary injunction to a stockholder assailing transactions in the corporate affairs of which the other stockholders do not complain, and to which they have given their consent. Du Pont v. N. P. R. Co., 18 Fed. R. 467.

A bill in chancery may be filed by some of a very numerous body of shareholders in an unincorporated association to enforce a common benefit in behalf of a class of persons against a few of their associates who are especially charged with fraud. In such case it is not necessary that all the parties in interest shall be made parties to the bill. McDowell v. Joice, 149 Ill. 124.

Where the wrong is actually or potentially to a class or number of members, then one or more of these will be the actor or actors, the proceedings being instituted by him or them on behalf of all. Green's Brice's Ultra Vires, 685-6; Story Eq. Pleadings, Sec. 97; 1 Daniell's Ch. Prac. (4th Ed.) 223; 48 Daniel Equity Rule U. S. Sup. Ct.

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And it is obligatory upon the complaining stockholder to sue in behalf of all the stockholders, since they are all equally interested in the results of the suit. *Wallworth v. Holt*, 4 *Mylne & Cr.* 619; *Taylor v. Salomon*, *Id.* 134; *Beman v. Rufford*, 1 *Sim. (U. S.)* 550; *Winsor v. Bailey*, 55 *N. H.* 218; *Blatchford v. Ross*, 54 *Barb.* 42; *Cunningham v. Pell*, 4 *Paige*, 607; *Marsh v. Eastern R. R.*, 40 *N. H.* 548; *Whitney v. Mayo*, 15 *Illinois*, 251.

But the bill need not allege who the other stockholders are, or whether a majority. *Descombes v. Wood (Mo.)*, 4 *S. W. Rep.* 82.

The application of a stockholder to a court of equity will not be denied merely because it is for the interest of the public or of the corporation, or of the stockholder himself, that the act complained of be allowed to stand. The law does not depend upon the opinion of the court as to the benefit of the act. *Hoole v. Great, etc., Ry. Co.*, *L. R.*, 3 *Ch.* 262; *Stevens v. Rutland Ry. Co.*, 29 *Vt.* 545.

WINSTON & MEAGHER, CAMPBELL & CUSTER, and GEORGE HUNT, attorneys for appellees; JAMES F. MEAGHER, of counsel.

A stockholder who holds stock which has been voted in favor of the act complained of will fail in an action that seeks to set aside that transaction. The law is clear that a stockholder who participates in an act or transaction *ultra vires* or even *malum prohibitum* can not afterward be heard to complain of the transaction in which he participated, in an action brought by him to set aside such transaction; and this rule extends to the transferees of such participating shareholder. *Hawes v. Oakland*, 14 *Otto* 450, 104 *U. S.*; *Dimpfell v. Ohio & Miss. Ry.*, 110 *U. S.* 209; *Taylor v. Holmes*, 127 *U. S.* 489; *Dannmeyer v. Coleman*, 11 *Fed. Rep.* 97; *Le Warne v. Meyer*, 38 *Fed. Rep.* 191; *Brown v. Duluth, etc., Ry.*, 53 *Fed. Rep.* 889; *Ffooks v. Southwestern Ry.*, 1 *Sm. & Giff.* 142; *Venner v. Atchison, etc., Ry.*, 28 *Fed. Rep.* 581; *Wood v. Corry*, 44 *Fed. Rep.* 146; *Parsons v. Hayes*, 14 *Abb. New Cases*, 419, and cases cited; *Langdon*

v. Fogg, 14 Abb. New Cases, 435 (note); Barr v. Pittsburg, etc., Co., 51 Fed. Rep. 33; Hyde Park Gas Co. v. Kerber, 5 Brad. 132; Mining Co. v. Mining Co., 116 Ill. 170 (p. 179); Aurora, etc., Society v. Paddock, 80 Ill. 263; Bradley v. Ballard, 55 Ill. 413.

By the allegations of the bill the whole scheme whereby the shareholders of the Gas Trust were to exchange their certificates in that company for certificates to be issued by the Fidelity Company was tainted with illegality. And complainant was, by the bill, a participant in that scheme, and subsequently ratified the same, and this appearing, the courts will not lend their aid to him in his efforts to now overthrow and undo the very arrangement of which he was part and parcel. The maxim *non oritur actio ex turpi causa* applies, and the courts will leave such parties where it finds them. Tobey v. Robinson, 99 Ill. 222; Craft v. McConoughy, 79 Ill. 346; Samuels v. Oliver, 130 Ill. 73.

Means of knowledge is equivalent to actual knowledge. Wood v. Carpenter, 101 U. S. 135 (p. 143); Credit Company v. Arkansas, etc., Ry., 15 Fed. Rep. 53; Taylor v. South, etc., Ry. Co., 4 Woods 575.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The complainant claiming to be a stockholder in the Chicago Gas Light & Coke Company, The People's Gas Light & Coke Company, The Consumers' Gas Company, The Equitable Gas Light & Fuel Company, The Hyde Park Gas Company, and the Lake Gas Company, six of the defendants named in the bill, filed his bill in the Circuit Court, alleging numerous fraudulent *ultra vires* acts by the officers of said corporations, a combination between said corporations and the Chicago Gas Company, and the Fidelity Insurance, Trust & Safe Deposit Company of Philadelphia, the other two defendants named in said bill, in fraud of the rights of appellant and in violation of the anti-trust law of this State, and prayed relief at the hands of the court from the consequences of such acts, and others of similar character, which the bill alleges were threatened by the defendants.

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The Chicago Gas Company and The Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia were not served with process and did not appear. The six defendant companies first named, each for itself, filed a general demurrer to the bill.

The cause came on to be heard upon the bill and the demurrers filed as above, and the court sustained said demurrers and dismissed said bill for want of equity, and awarded costs to the defendants.

From the decree so entered the complainant has appealed.

After alleging the incorporation of said six several gas companies, and the incorporation of the Chicago Gas Trust Company, and the acquiring by the latter of a majority of the stock of said six gas companies in furtherance of an illegal combination between said Gas Trust Company and said six gas companies, and the decision of the Supreme Court (Gas Trust case, 130 Ill. 268), declaring said combination to be against public policy and void, the bill proceeded to allege that to avoid the effect of said decision, the Gas Trust Company changed its name to the Chicago Gas Company, and transferred to it the stocks it had acquired in said six gas companies, and that the said Chicago Gas Company in turn transferred said stocks to said Fidelity Insurance Trust & Safe Deposit Company, of Philadelphia, where they now remain, by deeds of trust which provided that any holder of a certificate of stock in the Chicago Gas Company might, if he so desired to do, surrender the same to said Fidelity Insurance Trust & Safe Deposit Company, and receive in lieu thereof a certain other certificate issued by said Fidelity Insurance Trust & Safe Deposit Company, which would entitle every holder thereof to an undivided proportionate share of the total shares held by said Fidelity Company in said gas companies, and to certain specified rights in relation thereto.

The bill then alleged the enactment of the anti-trust law, approved June 11, 1891, and that said six companies come within the purview of its provisions.

The bill next alleged that the complainant is the holder and owner of a certain certificate issued to him by the said Fidelity Insurance Trust & Safe Deposit Company, which said certificate represents ten shares of one hundred dollars each, of the value of one hundred dollars each share, and that by reason of such ownership became, and is entitled to ten two hundred and fifty thousandths (10.250) of the entire stock of two hundred and fifty thousand shares, both in number and value, of the said Chicago gas companies, so held and controlled by the Fidelity Insurance Trust & Safe Deposit Company, under the trust deeds mentioned, and as such owner and holder is entitled to such an undivided proportionate part of the total two hundred and fifty thousand shares of the stock of the Chicago Gas Company on deposit with and held by the said Fidelity Insurance Trust & Safe Deposit Company, as the number of shares in said certificate mentioned shall bear to the whole or total number of two hundred and fifty thousand shares; and that he acquired said certificate and stocks without any knowledge that the same were issued pursuant to or in any manner tainted by any conspiracy or combination whatsoever.

It is then alleged that the complainant's stock and that of other stockholders is greatly diminished and impaired in value in consequence of the existence of the alleged combinations and conspiracies; alleged that complainant has requested the officers and agents of the six first named defendant companies, named in his bill, to desist and refrain from further disregarding and violating the plain provisions of their respective charters, as also the laws of the State of Illinois in the particulars in said bill charged and set forth, which they severally neglect and refuse to do; and complainant then says that he files his bill not only for himself, but in behalf of all others who are similarly situated, and who shall join with him in the prosecution of the cause, and share their just proportion of the expenses therein.

The prayer is for the appointment of a receiver of said six gas companies, and of the said Chicago Gas Company, whose duty, under the direction of the court, should be to

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take possession of all their assets, franchises and privileges, and continue the manufacture and supply of gas; that the alleged combination existing and doing business under the name of said Fidelity company be dissolved, and that all holders of stock or shares of stock issued by said Fidelity company, including complainant, be permitted to surrender the same, and to receive in lieu thereof their equivalent of the stock of the said six gas companies, if practicable, but if not, that then the property and franchises of each of said corporations be converted into money and distributed between the several stockholders according to their respective interests, and for an injunction, and for general relief.

In the view we take of the case, it is not necessary to set out the various *ultra vires* acts, and illegal conspiracies and combinations, charged by the bill to have been committed by either or all of the defendants. It is enough if, upon inquiry, it shall be ascertained that the complainant does not stand in a position to complain concerning said acts and combinations.

Omitting to consider whether the complainant, as the owner and holder of the certificate issued to him by the Fidelity company, may be held to be a stockholder in all or any of the said six gas companies to any amount, and as such entitled to such relief as a stockholder therein has or may have; and omitting to consider the right of the owner of but ten two hundred and fifty thousandths (10.250) part of what is held by the said Fidelity company to relief so radical as is prayed, and which if granted would affect, perhaps injuriously, the vastly preponderating interests and property rights of other persons, we will first consider whether the complainant stands in a position to claim the equitable relief he asks for, assuming that if he did stand in a position where he could claim it, he would be entitled to such relief.

It will be observed that the complainant does not allege when he acquired the certificate which he alleges he is the owner of, and which he says was issued to him by said Fidelity Trust Company, nor when he became the owner of

that which entitled him to have such certificate issued to him.

The rule is, that such construction will be given to the pleading of a party as is most unfavorable to the pleader. He had the right to state when he acquired said certificate, and when he acquired whatever it was that entitled him to have such certificate issued to him. Not having done so, we are bound to treat him as having been an owner thereof when the illegal and *ultra vires* acts and combinations of which he complains were committed, and as being a participant therein.

He alleges that he acquired the certificate without knowledge that the same was tainted with any conspiracy or combination; but that is not enough. He does not allege, and it is not inferable from his bill, that he did not know at the time it was committed all that was done of which he complains. Every inference deducible from his bill is, that he not only knew of, but participated in, all that he complains of. One who has participated in illegal acts and conspiracies, and partaken of the fruits thereof, may not tear down the structure he has helped to rear simply because he did not know that he had been engaged in illegality and conspiracy.

The general rule is, that equity will leave one who has been engaged in illegal conduct and seeks relief from its results, in the position where it finds him. He can not be relieved unless he himself be free from participation in the fraud. *Craft v. McConoughy*, 79 Ill. 346; *Tobey v. Robinson*, 99 Ill. 222; *Samuels v. Oliver*, 130 Ill. 73; *Hyde Park Gas Co. v. Kerber*, 5 Ill. App. 132.

The *laches* of appellant presents a further subject of consideration, which, because it does not appear to be argued by the able counsel for the appellees, we mention with hesitation.

We take notice that the decision of our Supreme Court declaring the Gas Trust to be an illegal combination was announced in 1889, and under the rule heretofore stated with reference to pleadings being most strongly construed

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against the pleader, the legal inference is, that the complainant was a stockholder in that illegal trust.

Color is lent to the correctness of such inference by a statement on page 11 of the brief of appellant's counsel that appellant acquired his stock through the Chicago Gas Company, to which it is alleged the Gas Trust, in order to avoid the effect of the decision referred to, changed its name and transferred the stocks it wrongfully held. We will, therefore, conclude both from the inference drawn from the bill itself, and from the statement of appellant's counsel, that appellant's interest, represented by his said certificate, was the same as that which he held in the illegal Gas Trust, and was acquired before the decision referred to, which was made five years before appellant filed his bill.

The case of *Rabe v. Dunlap*, 51 N. J. Eq. 40, was one where the two complainants held eleven out of a total of two hundred and forty-nine shares that were issued of an authorized five hundred shares of a corporation organized for specific objects. Some of the persons, not including the complainants, interested in that corporation, organized three other corporations for objects not embraced within those for which complainant's corporation was organized. At a later day, the four corporations agreed to consolidate under the provisions of an act purporting to authorize such consolidation. At the meeting of the stockholders of the four corporations called for the purpose of effecting such consolidation, a large majority of the stock in complainant's corporation was represented and voted in favor of consolidation, but the complainants did not attend, although they had notice of it, nor was their stock represented. All the formalities of the statute were complied with to effect a lawful consolidation of the corporations, and provisions were made for the exchange, share for share, of the stock in the old companies for stock in the new corporation, of which the complainants had notice, but did not comply with. The objects of the new corporation so formed were, however, radically different from, and wholly foreign to, the purposes for which complainants' corporation was created, and the

court held that had the complainants acted promptly, and while it would have been within the power of the court to have protected them without doing wrong and injustice to others, an injunction would have been granted to them to prevent the appropriation of the property of their corporation to new and different purposes from those for which their corporation held it, and from subjecting it to sale under a mortgage given by the new corporation to raise money for such variant purposes.

Yet the complainants having lain by, passive and inactive, for over three years, during which time the mortgage had been given, apparently assenting to the *ultra vires* acts complained of, they were held to be too late to obtain the relief asked for. Apparently the relief there asked was nearly as radical as that which is sought in this cause, for in the language of the opinion of the court, the complainants asked "to have the corporation ripped up from bottom to top, and everything which it has done affecting their rights may be undone."

The rule was there stated to be that to entitle stockholders to the summary interference of a court, they must apply so recently after the doing of the acts complained of that the court may stop or undo the wrong to them without doing equal or greater wrong to some other person; or, in other words, if a stockholder wants protection against the consequences of an *ultra vires* act, he must ask for it with sufficient promptness to enable the court to do justice to him without doing injustice to others.

And quotations were made from Lord Camden, that "nothing can call forth the activity of a court of equity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced;" and from Sir John Romilly, that "shareholders can not lie by, sanctioning, or by their silence at least acquiescing in, an arrangement which is *ultra vires* of the company to which they belong, watching the result, if it be favorable and profitable to themselves to abide by it, and insist on its validity;

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but if it prove unfavorable and disastrous, then to institute proceedings to set it aside."

See also *Kent v. Quicksilver Mining Company*, 78 N. Y. 159, where, although the issuance of the preferred stock there in question was *ultra vires* and the complainant was a non-assenting holder of common stock, relief was denied him on account of his neglect for four years to invoke a judicial declaration that the company had exceeded its powers.

And so in the case at bar, we see the complainant waiting for a period of about five years before asserting any right whatever to have the acts complained of set aside. In that time complainant alleges that a new bonded indebtedness of ten millions of dollars has been needlessly created for the purpose of defrauding him of his stock.

Now it is apparent that in the regular course of affairs there must be many persons who have invested in said new bonds, and to upset the entire arrangements under which said bonds were issued, and to destroy the entire fabric upon which they depend, would manifestly work harm and injury to many presumably innocent persons who have acted upon the doings of the corporations which have for so long remained unquestioned. The distinction between the *ultra vires* conduct of a corporation in respect to which the public is concerned, and such conduct as between the corporation and its stockholders only, is well pointed out by Judge Folger in *Kent v. Quicksilver Mining Co.*, *supra*, and should never be lost sight of in considering cognate questions. In the first case assent or laches by stockholders will avail nothing, while in the other it will control.

We do not think the complainant has made such a case as frees himself from the charges of bad faith and laches, and therefore, upon both grounds discussed by us, we think the decree of the Circuit Court dismissing his bill for want of equity should be affirmed, and it is so ordered. Affirmed.

64	404
f92	* 98
92	* 580
64	404
s98	340
s98	345

**Union National Bank, David Kelly and John J. P. Odell
v. Alfred Post, for the use of Francis A. Riddle.**

64	404
97	* 288
192s	388
64	404
113	* 97

1. APPELLATE COURTS—*Sufficiency of Evidence.*—The sufficiency of the evidence to support a verdict is a question to be considered exclusively by the Appellate Court.

2. PAYMENT—*By Taking a Note.*—The taking of one note for another is not a payment of the other, unless so treated and understood by the parties at the time.

3. PRACTICE—*Effect of Bringing Suit for the use of Another.*—The fact that a suit is brought for the use of another, in no wise affects the litigation, other than that the defendants having notice that the suit is brought for the use of another, can not make any settlement or compromise with the nominal plaintiff.

4. PROMISSORY NOTES—*Pledgee of, Bound to Account.*—A person with whom a note or anything else is pledged, is, in respect to the same, a trustee, bound to respond and account for the same as a trustee, and liable to be charged for neglect or misconduct like other trustees.

5. PLEDGEE—*Of Promissory Notes—Duty of.*—The pledgee of a promissory note is held to the exercise, in respect to the same, of such diligence as a prudent man exercises in respect to his own affairs.

6. SAME—*Responsibility of.*—When the pledgee of a promissory note, without authority, compromises with the maker thereof, he must respond to the pledgor and owner for the value of such note, and *prima facie* the face value is the true value, the burden of showing that the true value is less than the face value being cast upon the pledgee.

7. SAME—*Extent of Responsibility.*—The pledgee, in case of such compromise or settlement or a conversion of the pledged note to his own use, is responsible to the pledgor only for the true value, that is, for such damage as the pledgor has actually sustained.

8. AGENTS—*Declaration of, When Binding upon Principal.*—The admissions or declarations of an agent bind his principal only when made under the continuance of the agency in regard to a transaction then depending *et dum ferrit opus*. It is because the statement or admission is an act, a part of the *res gestae*, that it is admissible at all. His admission of what in the past he did for his principal, is not admissible, because such admission is not a part of the thing done.

Trover, for the conversion of promissory notes. Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed June 1, 1896.

GREEN, ROBBINS & HONORE, attorneys for appellants.

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FRANCIS A. RIDDLE, *pro se*; S. P. SHORE, of counsel.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This case was here and decided at the October term, 1894. (55 Ill. App. 369.)

It was then appealed to the Supreme Court, and with the title reversed, is reported in 159 Ill. 421.

That court held that the judgment of this court meant that the Superior Court erred in not instructing the jury to find for the defendants, then and now, appellants.

The opinion of this court, directing that judgment, could not control or affect the construction to be put upon the judgment itself. Coalfield Coal Co. v. Peck, 98 Ill. 129.

The Supreme Court held that the Superior Court could not have erred in not instructing the jury to find for the appellants, if the plaintiff, appellee, offered "any competent evidence whatever, which, with all its legal inferences and intendments, tended to prove his right of recovery;" and whether there was any such evidence that court held, as it had often before held, was a question of law, "reviewable as such, in" that court.

But it did not hold, nor use a word to indicate that it intended to hold—contrary to what it has always held since Appellate Courts were organized—that the sufficiency of the evidence to support a verdict was a question to be considered by that court, or that in this case there was such sufficiency. On that question the case stands here now, as it did a year and a half ago, with the added weight against the appellee of the declaration by the Supreme Court "that the taking of one note for another is not a payment of the other, unless so treated and understood by the parties, at the time."

As was said here in the first opinion, "It now appears by the testimony of Odell and West both, the only two persons who could know about it, that nothing was said between them, as to one being in, or accepted as, payment of the other." And it was then held that the rights of the parties

depended upon the real facts, and not upon anything said, if not the real fact, by Odell to Riddle. Then, as it appears that in the exchange of notes, there was no understanding between the parties to the exchange, the law declares, as is said in the opinion of the Supreme Court, that the taking of one for the other was not a payment. Had it been the opinion of the Supreme Court that the mere taking of the Times-West note, for the West-Munroe note, was a payment of the latter, probably that court would not only have reversed the judgment of this court, but affirmed that of the Superior Court, which not being done, it may be that that question has become *res judicata*. Union Mut. Life Ins. Co. v. Kirchoff, 149 Ill. 536.

Had such been the opinion of the Supreme Court, all errors assigned by the appellants here, would have been without injury. Penn. Coal Co. v. Kelly, 156 Ill. 9.

It is true, that in the words referring to the appellee used in the opinion of the Supreme Court, is the sentence—p. 431—“If there is evidence tending to support that theory (theory of payment), we are unable to see upon what just or legal line of reasoning it can be held that he is not entitled to a recovery.” Now it is to be supposed that the Supreme Court by that sentence meant to express an opinion as to the sufficiency of evidence, a question over which it has uniformly held, when directly presented, that it had no jurisdiction (Wallace v. Gould, 91 Ill. 15); and further, to overrule in this casual way, the many decisions of that court, made while it could review the facts, that a new trial should be granted upon a sufficient preponderance of evidence against the verdict. Some of such cases are collected in the opinion of the court, and more of them in the brief of counsel, in Thompson v. Fullenwider, 5 Ill. App. 551.

Wresting from the context on page 433 of the opinion of the Supreme Court the sentence commencing with “Certainly,” and ending with “It seems to us not,” the appellee presents them as an absolute declaration. They are only hypothetical, *i. e.*, if it be true that the one note was paid by the taking of the other.

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On the questions treated in the former opinion of this court, the Supreme Court not only has not acted, but, in accordance with its previous decisions, could not act, and so the case is before us as it was at first. The views then expressed we still believe to be correct.

The action being for the use of Riddle, has no other effect than to protect him against anything that Post might do *pendente lite*. *Tedrick v. Wells*, 152 Ill. 214.

The judgment of the Superior Court is reversed.

Under the terms of the order of the Supreme Court, remanding the cause to this court, we can not now, if we would, enter a finding of facts as a ground for not remanding, and the cause is remanded to the Superior Court.

Reversed and remanded.

SHEPARD, J., takes no part in this case.

OPINION, UPON PETITION FOR REHEARING, BY MR. JUSTICE WATERMAN.

We think that the jury below found that the defendants, by what was done with the collateral note for \$25,000, signed "James J. West, per F. S. W." converted such note to their own use, and that in consequence thereof the plaintiff, Post, the owner of said \$25,000 note, is entitled in this action on the case, to recover whatever damage he suffered by reason of such conversion.

When the pledgee of a promissory note collects money on account of the same to an amount exceeding the debt for which it is pledged, the pledgor has an action for money had and received to recover such excess. If, instead of receiving money upon a note so pledged, the pledgee converts the same to his own use, the pledgor may maintain an action of trover or trespass on the case, and recover the damage which he has sustained, which is the value of the note so converted. Of course, in such action the amount of the debt for which the pledge was given would be deducted from the value of the note for which the pledgee is liable. Under the finding of the jury that the \$25,000 note was by

the defendants converted to their own use, the principal question is, what, if anything, is the plaintiff, Post, entitled to recover—that is, what was the value of the \$25,000 note when converted?

Counsel for appellee now contends that there can be recovered in this action any damage which Riddle, the party for whose use this suit is brought, may have sustained in consequence of such conversion, and he calls attention to the evidence that Riddle, being informed that said \$25,000 note had been surrendered to West, thereupon advanced several thousand dollars to Post, believing that the \$9,000 excess of the \$25,000 note above the \$16,000 indebtedness for which it was pledged, was held by the bank for the use of him, Riddle, such excess having been by Post assigned to Riddle.

We do not agree with counsel for appellee in such contention. In this action, the only damage that can be recovered is that sustained by Post in consequence of the conversion of the \$25,000 note. The fact that this suit is brought for the use of Riddle, as well as the fact that Riddle obtained from Post an assignment of whatever balance might remain on this note after the \$16,000 note was paid, adds nothing whatever to the amount which can be recovered thereunder, and in fact, in no way or wise affects this litigation, other than that the defendants, having notice of such assignment, and that this suit is brought for the use of Riddle, can not make any settlement or compromise with Post. *Buckmaster v. Beames*, 4 Gilm. 443; *People v. Stacey*, 6 Brad. 521; *Lee v. Pennington*, 7 Brad. 247; *Northrop v. McGee*, 20 Brad. 108; *Chadsey v. Lewis*, 1 Gilm. 153.

If Riddle was informed by Odell that the \$25,000 had been paid, and if he had a right to rely upon such information, and in consequence thereof did advance to Post several thousand dollars, Riddle may be able to maintain an action against the defendants, or some of them, for such loss and damage as he, relying upon the statements of Odell in this regard, has sustained, irrespective of whether Post in this action is able to recover anything.

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Counsel for appellee urge that the \$25,000 note was, by what Odell did with the same, paid, satisfied and discharged, and that thereby the defendants became liable to Post for the face of said note, namely, \$25,000.

It is not very essential by what words the transaction between Odell and West, by which the \$25,000 note was surrendered to the latter, is characterized; whether it is termed a payment, a satisfaction, a discharge or a novation. The thing to be considered is, what was actually done. A person with whom a note or anything else is pledged, is, in respect to the same, a trustee, bound to respond and account for the same as a trustee, and liable to be charged for neglect or misconduct like any other trustee. The pledgee of a promissory note is held to the exercise, in respect to the same, of such diligence as a prudent man exercises in respect to his own affairs. Colebrooke on Collateral Securities, Secs. 114, 115.

So far as selling such note or compromising the indebtedness represented thereby with the maker is concerned, he has not the rights, and may not exercise the judgment, which a prudent man would in respect to his own affairs. When the pledgee of a promissory note, without authority, compromises with the maker thereof, he must respond to the pledgor and owner for the value of such note, and *prima facie* the face value is the true value, the burden of showing that the true value is less than the face value being thrown upon the pledgee. We regard the rule as well settled, that the pledgee in case of such compromise or settlement or a conversion of the pledged note to his own use, is responsible to the pledgor only for the true value—that is, for such damage as the pledgor has actually sustained. Jones on Pledges, Secs. 516, 518, 574; Girard Fire & Marine Ins. Co. v. Marr, 46 Penn. St. 504, 507; Hazzard v. Duke, 64 Ind. 220; Merchants and Planters Nat'l Bank v. Masonic Hall, 67 Ga. 271; Colebrooke on Collateral Securities, Sec. 131; Hancock v. Franklin Ins. Co., 114 Mass. 155, 157; Johnson v. Cumming, 109 Com. Law, 330; Jarvis v. Rogers, 15 Mass. 389; The Exeter Bank v. Gordon, 8 N. H. 66; Hunter v.

Moul, 13 Pa. St. 13, 15; Chinery v. Viall, 5 Exch. 287; Union Trust Co. v. Rigdon, 93 Ill. 458, p. 466; American Express Co. v. Parsons, 44 Ill. 315, 316; Zimpleman v. Veeder, 98 Ill. 613, 617; Sutherland on Dam., Vol. 2d, 190.

The verdict and judgment in this case is upon the theory that the note was actually worth its face—\$25,000. Deducting the \$16,000 to secure which the note was pledged, the plaintiff has recovered the full face value of the pledged note, with interest thereon, the judgment being for \$12,500. A very great preponderance of the evidence—indeed, substantially all of the evidence which actually shows what value the note had, is to the effect that the note, when converted, was, and ever since has been, valueless.

The question is not in this regard what any one may have said the value of the note was, but what its real value was; market value is usually the best test of value; by this is meant what, in the proper market, with reasonable effort and time in which so to do, the note could have been sold for. The party for whose use this suit is brought, Riddle, testifies that the note was perfectly good for its face; that his knowledge of its value was gained from what was told him by Odell, Weigley and West, Weigley being the personal counsel of West, and that it was upon statements made by Odell to him, Riddle, that he subsequently agreed to sign the \$16,000 note as Post's security. Such statement by Odell to Riddle might absolve him from his obligation to pay the \$16,000 note, but is mere hearsay as to its value, and does not touch the real question, which is—what could have been obtained or collected upon the note? Sherlock v. C., B. & Q. Ry. Co., 130 Ill. 403; Sedgwick on Dam., Secs. 243, 244, 245.

The \$25,000 note appears to have been surrendered to West about the middle of March, 1889.

The pledgee had no authority to sell the note; it was to mature September 17, 1889.

July 22, 1889, there was entered in the Circuit Court of Cook County at the suit of the Commercial National Bank, on a note made by James J. West, dated October 29, 1889,

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judgment against him for \$13,791.16, upon which, upon the 22d of July, 1887, levy was made upon the horses, carriages, household furniture and bric-a-brac contained in the house of James J. West, in Chicago. All of said property was taken from the sheriff July 30, 1889, upon four replevin writs, and the sheriff returned the execution, "No part satisfied, this 20th day of October, 1889."

On the 18th of September, 1889, in the suit of John Dolose et al. v. James J. West, judgment was entered in the Circuit Court of Cook County for \$1,108.54, upon his note for that amount, upon which execution was issued, and on the 15th day of November, 1889, returned, no property found and no part satisfied.

On the 9th of September, 1889, before a justice of the peace, judgment was entered against James J. West for \$97.20, upon which execution was issued and returned, "no property found and no part satisfied, this 21st day of December, 1889."

On the 19th of October, 1889, at the suit of Anson L. Story, plaintiff, judgment was entered against James J. West for \$5,192.76, upon which execution was issued and returned no property found and no part satisfied, January 20, 1890.

On the 19th of October, 1889, in the Superior Court of Cook County, judgment was recovered by Anson L. Story et al. against James J. West for \$5,177.91, upon which execution was issued, and returned no property found and no part satisfied.

In the United States Circuit Court for the Northern District of Illinois on the 27th day of November, 1889, judgment was entered against James J. West in the suit of John F. Irwin et al. for \$64,000. Execution was issued and levied on the interest of West in 1,200 shares of the capital stock of the Chicago Times Company, and all other capital stock of said Chicago Times Company, upon which return was made that said interest in said capital stock had been sold for \$275, and the execution satisfied as to such amount and unsatisfied as to the balance.

A member of the firm of Herman Schaffner & Co., bankers and brokers, buying and selling commercial paper, testified that they handled, on an average, from thirty to thirty-five millions a year; that in 1888 or 1889 they had some of the paper of Yaggy & West, of which firm James J. West was a member; that about 1888, or 1889, they had paper of James J. West offered to them in the course of business; that they never bought any of it; tried to sell it and could not; that this was in the spring of 1889, and it was offered to their firm frequently during that time; that it was the business of the firm of Herman Schaffner & Co. to go around to different banks, both in the city and out of town, to negotiate paper; that they were unable to sell the paper of James J. West that spring; that when West paper was presented they did not know sufficient about it to buy it; did not absolutely refuse, but said they would see about it; that they tried to see if they could negotiate it in the Chicago banks, and were unsuccessful; that the result was, they never took any West paper themselves, and were unable to place it; that in the spring of 1889 West paper had no market value in the city; that is, they could not dispose of it.

Frederick S. Eames, who was second vice-president of the Commercial National Bank in 1889, which had business relations with James J. West, testified: "We had occasion to investigate West's financial responsibility in March and April, 1889, and for a few months before that. Our bank at that time had a note of Mr. West's that had been made in 1887, for \$25,000, on which \$12,000 had been paid. In the spring of 1889 we undertook to collect the balance of it, but were unable to do so. We had a great many interviews with West, and tried to bring all the pressure we could to bear on him, but were unable to get any money. Later on we entered up a judgment upon the note, and tried to collect it by execution, but were unable to do that; by personal experience I should have thought it was very hard to dispose of West paper in March, 1889. I do not think it had any market value; we did our best to collect this paper, and were unable to do so. I do not think a note of James J.

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West's for \$25,000, due in September, 1889, could have been sold in March, 1889; in my opinion it did not have any market value in Chicago in March, 1889."

There is no evidence tending to show that between the middle of March, 1889, the time when the \$25,000 note was converted, and the 22d day of July, 1889, or thereafter, the financial condition of said James J. West underwent any change other than the natural one of the maturing of obligations and the coming to a head of the situation which at the time of the conversion of the note was existing. It is true that West testifies that in the month of March, 1889, his condition was perfectly solid so far as he knew; that he did not have any paper for sale on the street; that he never was refused money by any bank he ever applied to; that at that time he does not think there was any doubt but that his note and the note of the Times Company were both worth their face. But we do not think such opinion can prevail against testimony as to the actual facts existing—that the note of James J. West had, in March, 1889, no market value whatever, and the fact that there is nothing to show that it has ever since had any actual value, or ever been collectible, or that anything ever has or could have been realized thereon. The question in this regard, therefore, appears to us to be whether the note of James J. West, which had neither market value, nor, so far as appears, any actual value, upon which nothing has ever been realized, nor is it shown that by any exertion anything could have been realized thereon, was, by the conversion thereof by the defendants in exchanging the same for another note of ten days later date, signed by the Chicago Times Company and by James J. West, converted into an instrument of value upon which a recovery can be had of \$25,000. If the defendants, or any of them, have received anything on account of the \$25,000 note by them converted, they ought to account for the same to the plaintiff, and if the plaintiff by reason of such conversion lost anything of value—was damaged, then to whatever amount he was so injured, the defendants should respond; but the evidence in this case seems to be clear that

said note had at the time of its conversion neither market nor actual value.

The judgment in this case can not, upon the record here presented, be sustained as to both Kelley and the Union National Bank.

Kelley either did or did not purchase the \$16,000 note and become its owner. As to this, there is evidence tending to show that, notwithstanding the assignment of that note, the bank continued to be the real owner thereof. If so, then in all that Odell did he acted as the agent of the bank and not of Kelley. There is no evidence that Kelley ever instructed Odell to do anything whatever in respect to the collaterals. Kelley, while testifying that he did buy the \$16,000 note, says: "At the time I gave this paper to Odell, I told him to bring suit, or do anything necessary to collect it. I did not know anything about what Odell did with these notes—that the \$25,000 note was exchanged by Mr. Odell for the Chicago Times note for \$25,750. I first heard of these exchanges of collateral notes about the time I had judgment entered upon that note, which was, as I recollect, about a year after I bought the note. I don't think I ever saw the note signed by the Chicago Times Company until yesterday; never had any of these collateral notes, except the original Munroe note, in my possession."

Mr. Odell testifies: "When I made that exchange, I was acting for Mr. Kelley, and not for the Union National Bank. I made these exchanges without any authority from Mr. Kelley. He never objected to it, and did not ratify it in any specific manner. I reported to him what I had done, and could not say he objected. I had no interest in the matter myself. Mr. Kelley did not know what was done until long afterward; when I reported to him he raised no objection to what was done; I should say, I reported to him the first exchange shortly after it was done; he said all right, or something of that kind."

This is not sufficient to fasten upon Mr. Kelley liability for the value of the collateral note exchanged by Mr. Odell for the Chicago Times and West collateral note, unless Mr.

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Kelley is to be treated as the owner of the \$16,000 note, and thereby the holder of the collateral, and entitled to give directions as to its disposition.

It is urged that Mr. Kelley ratified all that Odell had done. It is doubtful if the testimony of Odell as to what Kelley did when told of the exchange, can, in the face of the testimony of Mr. Kelley, be considered as establishing a ratification of the exchange; while, if Mr. Kelley was not the owner of the \$16,000 note, then he was in no position to ratify anything that Odell had done in respect to the collateral.

As has before been said, the pledgee of a promissory note is held to the exercise of such diligence in respect thereto as a prudent man exercises in regard to his own affairs.

In Colebrooke on Collateral Securities, Sec. 15, it is said:

“The exchange or substitution of other securities for those originally delivered as collateral, has no effect upon the rights of the pledgee, as founded upon the original contract. The surrender of the securities originally deposited is a valuable consideration for the giving of the new securities, and the pledgee is as to the latter a holder for value, in the usual course of business. Such exchange and substitution is sometimes of the utmost benefit to the pledgor, and is supported as against creditors, for the reason that they are not harmed thereby.”

In Girard Fire and Marine Ins. Co. v. Marr, 46 Pa. State 504, against the protest of the pledgor, there had been by the pledgee an exchange of certain collateral securities deposited to secure the pledgor's debt. Suit was brought against the pledgor upon the note so deposited. The court said:

“The court, we think, erred, therefore, in placing the defense on the simple ground that the plaintiffs exchanged the securities mentioned, without the consent of Thurlow, Hughes & Co. No doubt the pledgee of securities takes upon himself some increase of responsibility in making exchanges; the more his acts in the premises are complicated, the more numerous will be the points of attack that he may

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have to guard, when the question of his care and diligence comes to be tried; but I take the law to be settled, that it is only the omission of these that will require the holder to account for collaterals when they have proved a worthless security. I think this rule the safest for all parties, and it should be adhered to unless altered by the terms of the pledge."

In the present case, the note deposited as collateral was as follows:

"\$25,000.

CHICAGO, September 14, 1888.

One year after date I promise to pay to the order of James E. Munroe twenty-five thousand dollars, with interest at the rate of six per cent per annum, value received.

JAMES J. WEST,
per F. S. W."

While we have in this case the testimony of Mr. Munroe that Mr. Frank S. Weigley, by whom the name of James J. West was signed to this note, was authorized to so sign, yet it is apparent that the note upon its face was not merchantable. Any one to whom it was presented, for purchase, would see at once that the holder had upon himself the burden of establishing that "F. S. W." was authorized to sign the name of the maker, James J. West. Mr. Odell testifies that he recognized this, and it was one of the reasons which prompted him to make the exchange.

In the middle of March, 1889, Mr. Odell exchanged this note for the following:

"\$25,750.

CHICAGO, March 16, 1889.

September 24, 1889, after date we promise to pay to the order of James J. West, \$25,750, payable at Times office, Chicago, value received, six per cent interest.

CHICAGO TIMES COMPANY."

(Indorsed on back:)

"James J. West," and again on back, "James J. West."

This note is shown by the evidence to have been, so far as the Chicago Times Company is concerned, an accommodation note, and was probably not binding upon it, but was binding upon James J. West, whose name appeared upon

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the back thereof, and for whose accommodation it was made. It was made for the amount of the surrendered note, with interest up to March 16th, and was payable ten days later than the surrendered note, that note being due September 17, 1889, while the Times Company and West note was due September 27, 1889. Whether, under the circumstances, this exchange was such a one as a prudent man would have made, dealing with his own affairs, is a question of fact for the determination of the jury, as is also the question whether the plaintiff by reason of such exchange sustained any damage, which questions, upon the record here presented, it must be presumed the jury resolved against the defendants.

While the face value of the notes may have been the same, yet the difference in the times of their maturity is an essential element to be considered in determining whether the exchange was such as a prudent man would, in respect to his own affairs, have made.

If the exchange was not such a one as Odell had a right to make — that is, if it was not such an exercise of diligence as a prudent man uses in respect to his own affairs — then it is manifest that so soon as the exchange had taken place, whatever damage was thereby caused the plaintiff, had happened, and the bank could not escape liability by receiving back the note it had surrendered.

As the plaintiff's right of action, if any, was complete so soon as the exchange took place, and his damage is to be estimated by the condition of affairs then existing, any subsequent negotiations between the defendants or either of them and West, as to the payment of any or either of his notes held by the bank, as also any attempts made by the bank to collect or realize upon the notes of West, or either of them, which resulted in nothing, were not admissible upon the trial of this case, save for the purpose of showing what the value of the note of James J. West surrendered, was at the time of its exchange.

Neither such negotiations or attempts to collect could add to or take from the fact of the exchange and the consequent responsibility and liability of the bank therefor. As such

evidence did not tend to show that the note had any value at the time of its exchange, it should not have been admitted at the instance of the plaintiff and against the objection of the defendants.

At the instance of the plaintiff, the jury was instructed as follows:

“7. You are instructed that if you believe from the evidence that Mr. Odell had authority to do and say whatever he did do and say about the \$16,000 note and the collateral note pledged with it, and that he did give that collateral note up to West, and took the Chicago Times Company note in payment of the collateral note, and that he did, on the 29th or 30th day of April, 1889, assure Mr. Riddle that said two notes were paid, and that he, Riddle was no longer liable in relation thereto, and if you further believe that said Riddle, acting on the faith of such assurances, did advance a considerable amount of money to Post, then in such case said Odell and those for whom he acted would be estopped from claiming contrary to such assurances.”

Such instruction should not have been given. As before stated in this suit, it is immaterial what advances Riddle may have made to Post on the faith of assurances to him given by Odell. For such advances, as before stated, Riddle may have his separate action, but that can not be considered in this case. The instruction had a tendency to make the jury think that in this action a recovery could be had by Post for advances made to him by Riddle. The instruction would also be objectionable in any case against several defendants making separate defenses, because it put no limitation upon the source from which Odell had received authority.

It is urged that the court erred in refusing to give the following instruction:

“The jury are further instructed that the declarations or statements of an agent are evidence against his principal only when such statements and declarations are made by the agent while he is engaged in acting for his principal. The statements of an agent which are merely narrative of a

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past transaction in which he was engaged for his principal, are not competent evidence against the principal, and any statements of Odell of this character in the evidence are not competent evidence for you to consider in reaching a verdict with respect to the defendant, Kelley, and in determining the liability of Kelley, you will exclude from your considerations any such statements of Odell."

As asked, we do not think it was error to refuse the instruction. The jury might, therefrom, well be in doubt as to the character of the statements of Odell which they were to exclude from their consideration. The admissions or declarations of an agent bind his principal only when made during the continuance of the agency in regard to a transaction then depending *et dum fervit opus*. It is because the statement or admission is an act, a part of the *res gestæ*, that it is admissible at all. His admission of what at the past time he did for his principal, is not admissible, because such admission is not a part of the thing done. 1 Greenleaf on Evidence, Sec. 113.

The petition for a rehearing is denied.

**Benjamin L. Cook et al. v. Don A. Moulton, Trustee,
et al.**

1. **PRACTICE—Reversals with Directions.**—When a case is reversed and remanded with directions to enter a decree in accordance with the opinion, this court will take notice upon a second appeal of the same cause that its mandate upon the first appeal has not been obeyed.

2. **CHANCERY PRACTICE—Second Answer—Where Surplusage.**—Where a guardian *ad litem* for minor defendants filed his answer in the usual form, to which a replication was filed, and afterward filed a second answer to which no replication was filed, it was held that the second answer was surplusage.

3. **SAME—Testimony Where New Parties are Made.**—Where a cause is reversed and remanded with directions as to the entry of a decree, no additional evidence is necessary. The fact that new parties, including minors, as heirs and representatives of a deceased party were required to be made defendants, does not require a re-reference to the master for the purpose of taking proofs.

4. PARTIES—Deceased Defendant—Rights of Heirs, Succeeding.—Where the heirs and representatives of a deceased defendant in equity proceedings are made parties they succeed to the rights of their deceased ancestor, and are bound by the record as it was in the latter's lifetime, and everything that would have concluded such ancestor concludes them.

5. JUDGMENT—Nominal Defendants in Foreclosure.—It is error to enter a personal judgment against a nominal defendant in a foreclosure proceeding.

Foreclosure Proceedings.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULRY, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed June 1, 1896.

Wm. M. JONES and W. IRVING CULVER, attorneys for appellants.

J. B. STURMAN, attorney for appellees.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This cause was here once before upon appeal, under the title of Rooney et al. v. Moulton et al., 60 Ill. App. 306. The decree then before us was reversed and the cause remanded for other and further proceedings, in accordance with the opinion then filed and reported as above.

We then held, and the opinion said:

“The decree not only provides for a foreclosure, but also that the Cooks pay to the bank \$7,383.09 with costs, and that the bank have execution therefor. This is assigned as error, and is error.”

The mandate to the Circuit Court that issued from this court required that a decree be entered in accordance with said opinion. That was not done. The decree now before us, as did the one that was reversed, contains a personal decree against the appellant, Benjamin L. Cook, which we then held, and now repeat, was error. The only change in attempted compliance with the mandate, in that regard, was to omit from this decree the clause contained in the former one awarding execution for the amount found due and decreed to be paid.

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In addition to what was said in the opinion referred to, we refer also to *Cook v. Moulton*, 64 Ill. App. 429, where we have commented more at length upon the effect of incorporating a personal judgment into a foreclosure decree. Even though it be not assigned for error upon this appeal that the decree was a personal one against Cook, this court will, unaided, take notice upon a second appeal that its mandate upon the first appeal of the same cause has not been obeyed. *Oldershaw v. Knoles*, 6 Ill. App. 325; 2 Encyclopedia of Pl. & Pr. 923.

Pending the first appeal Ellen M. Cook, one of the then appellants, died, and Rooney, her administrator, was substituted for her, and after the cause was re-docketed in the Circuit Court her four children and heirs at law, together with said administrator, were there substituted as parties in her place. Two of said children were minors, and a guardian *ad litem* of them was appointed, who filed the usual answer for them.

It seems that to said answer of the minors, a replication was filed, and that subsequently another like answer was filed for the minors, to which no replication was filed. The adult substituted defendants were defaulted, and the new decree was entered.

Various errors are assigned, which call in question the proceeding to a hearing and decree after the minors were made parties defendant, without re-referring the cause to a master in chancery to take proofs and report; and in entering a decree without evidence as against them, and without having afforded them or their guardian *ad litem* an opportunity to cross-examine appellees' witnesses or to offer evidence in their own behalf; and in entering the decree without a replication having been filed to the said last answer of the minors.

There seems to have been no reason for filing the second answer of the minors. It was identically like the first one, which was in the usual form of such answers. Replication to the first answer having been filed, the issues as to the minors were properly joined, and we think the second an-

swer may well be treated as mere surplusage in the case. As to proceeding to a decree without a re-reference, there was no error. There was not a general reversal and remanding of the cause. No new testimony was necessary in order to comply with the mandate of this court. All that remained for the Circuit Court to do was to revise its decree in accordance with the opinion of this court. The fact that new parties, including the two minors, as heirs and representatives of the deceased Mrs. Cook, were required to be made defendants, did not alter the status of the case. The minor heirs, as well as the others who succeeded to the rights of their deceased ancestor, were bound by the record as it was made in the latter's lifetime, and everything that would have concluded her concluded them.

With reference to the other errors assigned, we do not regard any of them as well taken, and we refer to what we have said in Cook v. Moulton, 64 Ill. App. 429, concerning the assigned error because of that provision of the decree adjudging parties to be in contempt who should refuse to surrender possession after delivery of a master's deed.

For the error in decreeing a personal judgment against the appellant, Benjamin L. Cook, the decree is reversed, and the cause remanded for a new decree in conformity with this opinion. Reversed and remanded.

64	422
69	118
64	422
92	1621
64	422
110	1129

Samuel Friedman v. H. Schwabacher and J. Schwabacher.

1. **LEASE—Where the Tenant Takes the Premises as he Finds Them.**—When a lessee enters into a contract of lease whereby he covenants that he has received the premises in good repair and agrees to keep them so at his own expense, there is no implied contract on the part of the lessor that the demised premises are tenantable or that they will continue to be so during the term. The lessee takes the premises as he

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finds them and must hold them subject to whatever covenants his lease contains.

2. PAROL EVIDENCE—*Sealed Instrument*.—It is improper to admit parol evidence to vary the terms of a lease under seal.

Assumpsit, for rent. Appeal from the County Court of Cook County; the Hon. C. A. BISHOP, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

BLUM & BLUM, attorneys for appellant.

ASHCRAFT, GORDON & COX, attorneys for appellees.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment recovered for one month's rent under a written lease of certain premises in Chicago.

The lease is not shown in the abstract, but we gather from the testimony of the appellant that he was the lessee and moved into the premises on the first day of May, 1893, and "moved out the end of November." And we infer from the testimony of one Porter, a witness for the appellees, that the "rent for December has not been paid," and that appellant "said he would not pay it;" that the lease by its terms obligated appellant to pay rent for some month of December—presumably that first succeeding the November in which appellant moved out, in whatever year that may have been.

All that the abstract shows concerning the lease is as follows:

"Plaintiff offers lease between the parties in evidence, which provides for the payment of rent in advance at the rate of \$140 per month. Leases the premises known as the store and basement No. 472 State street; contains among other covenants the one that appellant has received the premises in good repair and agrees to keep the same in repair at his own expense."

Thereupon the appellant by his counsel made a general offer of proof as follows:

"Now, if the court please, I make an offer to prove as

follows: To show that the plaintiff, before the lease was signed, proposed to defendant to lease him the premises in question; that is, the store and basement; the second and third floors were occupied by other tenants. That he had not seen the premises. That plaintiffs promised him to place them in good tenantable condition, and after signing the lease, the landlord did have men at work painting and papering the premises for ten or twelve days. That when defendant moved in he found the premises filled with sewer gas, the basement filled with water, so that it was necessary to practically float about in order to make any progress. That there was only one water closet in the building, and that was in the basement, to which all the tenants had access. That the basement was filthy; in bad condition; that defendant repeatedly complained to plaintiffs about this condition, and as often they promised to alter it and place the premises in proper condition; that he remained in the premises for about fourteen to eighteen months, and finding that the premises were not placed in proper condition as promised, and his family having become ill on account of the unsanitary condition existing, he removed."

To which offer the court sustained an objection. It was then stipulated by counsel that one Barrow, an expert plumber, would testify, if his testimony were competent and he were allowed to testify, as follows: "He examined the premises November 18, 1894, and found them filled with sewer gas and the basement filled with water and the catch-basin in bad condition, and the premises in such an unsanitary condition that it was highly dangerous to health."

Looking specifically at the above general offer, it will be observed that although mention is made of the occupancy of other parts of the building by other tenants, and that such tenants had access to the one water closet in the basement, there was no offer to show that appellant's premises suffered in any respect from such facts. If, as seems by the portion of the lease that is abstracted, the basement was a part of appellant's premises, he alone was at fault if he permitted unauthorized persons to use the water closet therein located to his detriment.

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What the rights of a lessee of a part of a building may be under an eviction because of the doings of tenants of other parts of the building is not a question made upon this record, and we will not discuss it.

When a lessee enters into a contract of lease whereby he covenants that he has received the premises in good repair and agrees to keep the same in repair at his own expense, there is no implied contract on the part of the lessor that the demised premises are tenantable, or that they will continue to be so during the term.

In such a case the lessee takes the premises as he finds them, and he must hold them subject to whatever covenants his lease contains. *Johnson v. Wilson*, 33 Ill. App. 639; *McCoul v. Herzberg*, 33 Ill. App. 542; *Blake v. Ranous*, 25 Ill. App. 486; *Platt v. Farney*, 16 Ill. App. 216.

And it would have been improper to admit parol evidence to vary the terms of the lease, it being sealed. No authorities are needed on so familiar a proposition.

The offered evidence was properly excluded, and the judgment of the County Court is affirmed.

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Michael M. Levinson v. Edward J. Malloy.

1. **MECHANIC'S LIEN—*Insufficient Statement*.**—The court holds that the statement of the claim for a lien set out in the statement of the case sufficiently sets forth the time when the material was furnished and labor performed, and is sufficient under the statute.

2. **SAME—*Sufficiency of Contract*.**—Where the labor is performed within one year from the time within which the contract was made, the performance brings the contract within the statute.

Mechanic's Lien.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

STATEMENT OF THE CASE.

Appellee filed a bill in the Circuit Court of Cook County to enforce a claim for a mechanic's lien for \$360 against the

premises of appellant, described as lot 7, block 10, Vernon Park addition to Chicago, a subdivision of section 17, township 39, range 14 east of the third principal meridian, Cook county, Illinois. The bill sets forth the making of a verbal contract between appellant and appellee about April 5, 1894, for the furnishing of material and the performance of the labor in and about the mason work for the construction of a building upon the above premises for the sum of \$785. That said work was begun about the 11th of April, 1894, and finished on July 17, 1894, and that all except \$360 has been paid. That on the 13th of November, 1894, complainant filed with the clerk of the Circuit Court of Cook County a just and true statement or account and demand of his claim after allowing all credits and setting forth the time when such material was furnished or labor performed, a copy of which statement is annexed and marked "Exhibit A." The bill prays for relief and that a lien be decreed. "Exhibit A" sets forth that the following is a just and true statement or account or demand due to Edward J. Malloy from Michael M. Levinson after allowing all credits and set-offs for material furnished to and labor performed for the said Michael M. Levinson in accordance with a certain verbal contract made the 5th day of April, 1894, to furnish the material and perform the labor in and about the mason work upon the two story and basement brick building situated upon the hereinafter described premises for the sum of \$785. Then follows:

"CHICAGO, November 1, 1894.

Michael M. Levinson to Edward J. Malloy, debtor:

To amount due for mason work upon your two-story and basement brick building in rear of No. 273 Loomis street, Chicago, Illinois, \$785.

The said \$785 being the contract price for said mason work, according to the terms of verbal agreement made on, to wit, April 5, 1894. The said mason work being commenced on, to wit, April 11, 1894, and completed on, to wit, July 17, 1894, the said sum of \$785 became due and payable on completion of said mason work on, to wit, July 17, 1894."

Levinson v. Malloy.

Underneath, credits are given to the extent of \$425, and a description of the property as already set forth. This is followed by an affidavit of Edward J. Malloy that he has read the foregoing statement or account or demand due him, said Malloy, from said Levinson, by him subscribed, and that the same is just and true. That the description of the real estate contained therein is true.

To this bill a general demurrer was interposed by appellant and another defendant, which was overruled by the court, and the defendant filed an answer denying all the allegations except as admitted, and denying that complainant had filed in the office of the clerk of the Circuit Court a just and true statement or account or demand, after allowing all credits and setting forth the times when any material alleged to have been furnished was furnished or labor performed, and containing a correct description of the property to be charged with a lien duly verified by affidavit; and denying that complainant is entitled to any relief and praying the same advantage of the answer as if he had pleaded or demurred to the bill. A replication having been filed the cause was referred to a master in chancery to take testimony and report his conclusions. Pursuant to this order of reference, the master, on June 28, 1895, made his report to the court, in which he recited that he had taken the testimony and found the allegations made in bill of complaint sustained by the proofs, and that there was due appellee \$360, together with interest due from July 17, 1894, and that complainant is entitled to a mechanic's lien on said premises. Objections were filed before the master and were afterward, by agreement of parties, ordered by the decree of the court to stand as exceptions. The only evidence introduced before the master, accompanying the report, was that of appellee, who stated in substance that he had made a verbal contract with appellant, as already noted, and that he built a building pursuant thereto in the rear of 273 Loomis street; that he completed the work by the 17th day of July, 1894, and it was accepted by appellant; and that he received payments aggregating \$425, leaving a balance of \$360, for which he

took a note payable in sixty days and which has not been paid. On cross-examination, the witness testified that under the contract he was to furnish stone, lime, sand, cement and brick, and in response to the question, "What materials did you furnish?" he answered, "I furnished brick, lime, and sand." He stated further that he was unable to tell what part of the \$360 represented the material and what part labor. The statement already referred to was offered in evidence, and this comprised all the testimony upon the question of the lien.

The master's report was confirmed, and a decree entered in accordance therewith.

BLUM & BLUM, attorneys for appellant.

GEORGE W. PLUMMER, and WHARTON PLUMMER, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellee having made a contract to do the mason work upon a certain building, the work and materials were furnished when he completed his contract, viz: July 17, 1894. The statement filed with the clerk of the Circuit Court truly set forth the time when the material was furnished and labor performed, and was in accordance with the statute. Freed v. Blanchard, opinion filed May, 1896, Supreme Court of Illinois.

The work was performed within one year from the time within which the contract was made; the performance brought the contract within the statute. Driver v. Ford, 90 Ill. 595; Orr v. N. W. Mut. Life Ins. Co., 86 Ill. 260; Clark et al. v. Manning et al., 90 Ill. 380.

No objection was made in the court below that the past due, unpaid note given by appellant, had not been surrendered to him. The objection can not for the first time be here made.

The evidence by clear inference shows that the improve-

Cook v. Moulton.

ment is upon the lot known as 273 Loomis street. "Building in the rear of 273 Loomis street," means upon the rear part of 273 Loomis street.

The decree of the Circuit Court is affirmed.

34 429
64 421**Stella Sturges Cook and Geo. D. Cook v. Don A. Moulton, Trustee, and the Globe National Bank.**

1. **JUDGMENTS—Personal—In Foreclosure Suits.**—A court is without power in a foreclosure to render a personal judgment in the first instance against a mortgagor, when there is no statute authorizing, and except for the statute, there is no power to render a personal decree for a deficiency after sale.

2. **FORECLOSURE—Personal Decrees.**—It is only for a deficiency existing after a sale of the mortgaged property, that the statute authorizes a personal decree.

3. **APPELLATE COURT PRACTICE—Subsequent Appeals—Assignment of Errors.**—The appellant in a cause which is reversed on a cross-error is not estopped from assigning for error upon a subsequent appeal the same errors assigned by him upon his first appeal, and from insisting upon and arguing such errors even though upon his first appeal he waived them by failing to argue them, when upon such former appeal, there was no decision upon the merits of the assigned errors.

4. **SAME—Decision—When Final.**—A decision of a case by an appellate court on the merits is final as to the matters decided, and is conclusive upon the parties upon a second appeal or writ of error in the same case. The questions so decided can not again be brought before the court for consideration except upon a petition for rehearing.

5. **SAME—Assigned, but Not Argued.**—In civil cases it is within the discretion of the court whether it will notice errors assigned, but not insisted upon in the argument.

6. **CONTEMPT OF COURT—Decreeing in Advance—What Constitutes.**—The propriety of decreeing in advance what subsequent conduct will constitute a contempt may well be questioned; it is certain that no valid judgment of contempt can be made without notice, etc., but such an order in a decree does not invalidate it.

Foreclosure of Mortgage.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed June 1, 1896.

Wm. M. JONES and W. IRVING CULVER, attorneys for appellants.

J. B. STURMAN, attorney for appellees.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This cause is here for the second time. It was reversed on the first appeal (Cook v. Moulton, 59 Ill. App. 428), upon a cross-error assigned by the then, as now, appellees, for a refusal to allow solicitor's fees, as provided by the terms of the mortgage sought to be foreclosed by appellees, and the cause was remanded to the Circuit Court with directions to enter a new decree including solicitor's fees, in accordance with the master's report.

Under such mandate the Circuit Court proceeded to enter a new decree including an allowance of solicitor's fees, which were allowed by the new decree.

It is now, as it was on the former appeal, assigned for error by the appellants that this decree awards execution against appellants, as did the old one, for the amount found to be due.

The decree, after finding there was \$8,184.61 due at the date thereof, and that the sum so found to be due constitutes a prior and paramount lien upon the interest of the appellants in the mortgaged premises, proceeds as follows:

"It is therefore ordered, adjudged and decreed, that the complainant, The Globe National Bank of Chicago, do have and recover of and from the said Stella Sturges Cook and George D. Cook the said sum of eight thousand one hundred eighty-four dollars and 61-100 (\$8,184.61), with costs of suit to be taxed, and that it have execution therefor." The decree then proceeds to provide for a foreclosure.

We have, therefore, in this decree a personal judgment, as at law, against the appellants, and an award of execution thereon in the first instance, and before it is known that there will be any deficiency.

This was manifest error.

A court is without power in a foreclosure suit to render a personal judgment in the first instance against a mortgagor, where there is no statute that authorizes it; and, ex-

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cept for the statute, there is no power to render a personal decree for a deficiency after sale, but the mortgagee would be left to resort to law.

It is only for the deficiency, if any, that exists after the foreclosure sale that our statute authorizes a personal decree. *Rooney v. Moulton*, 60 Ill. App. 306.

But it is contended by the appellees that the error being waived by a failure of appellants to argue it upon their first appeal, it can not be taken advantage of now.

We do not think that the appellant in a cause which is reversed upon a cross-error is estopped from assigning for error upon a subsequent appeal the same errors assigned by him upon his first appeal, and from insisting upon and arguing such errors, even though upon his first appeal he waived them by failing to argue them, when upon such former appeal there was no decision upon the merits of the assigned error. It would probably be otherwise if the error assigned on the second appeal had not been assigned on the first appeal, and the merits of the whole cause had been decided. The rule is, that a decision of a case by an appellate court on the merits is final as to the matters decided, and is conclusive upon the parties upon a second appeal or writ of error in the same case. The points and questions thus considered and decided can not be again brought before such court for review, and can not be reconsidered, except upon a petition for a rehearing. *West v. Douglas*, 145 Ill. 164; see, also, *Union M. L. Ins. Co. v. Kirchoff*, 149 Ill. 536 (p. 542).

The only merits on the part of appellants that were considered on the first appeal were those that related to the effect upon the appellant, Mrs. Cook, of the claimed alteration of the note that the mortgage was given to secure. That question being determined adversely to the appellants, could not be, and is not, urged again upon this appeal.

The cross-error of appellees then coming on to be considered, it was held that the decree should be reversed and the cause remanded for a new decree correcting that error.

True, if we had chosen to consider the error now insisted

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upon, and then assigned but not urged, we should have reversed the decree on that ground also, but so doing would have carried the costs against the appellees, which, under the circumstances of appellant's waiver of assistance to the court, we thought should go in favor of the appellee, who had assigned and argued a successful point. And we had the right to assume that an error so plain and elemental as the one assigned, though not argued, and because not argued not decided, although open to decision if we had felt inclined, notwithstanding we were entitled, as we did, to treat it as waived, would be taken notice of by appellees and obviated in their new decree.

The old decree having been abrogated by the direction of this court upon the suggestion of appellees, and a new decree having been made, we think the appellants may again assign for error a matter before assigned, involving merits not previously considered at all, and insist upon the error now, although they did not before.

It is not so much what parties do, as what the court does, that may be treated as *res adjudicata*.

On the former appeal we expressly refused to consider the error that was assigned, and is now again before us, because of the omission of counsel in not arguing it.

While, under repeated decisions, counsel could not complain that we did not consider the error, still, as we understand the rule, it was only a privilege of the court, and not a duty, to pass over what counsel had, by a failure on his part, given the opportunity for. "In civil cases it is within the discretion of the court whether it will notice errors assigned but not insisted upon in argument." Lehrman v. Meyer, 67 Ala. 396.

Now, however, with the question urged upon us, we think it is our duty to consider the merits of the particular question as one not *res adjudicata*. And what we have said disposes of it.

It is further urged that the decree is erroneous, in that it orders in advance that if after the delivery of the master's deed the defendants, or any person claiming under them

Hasterlick v. Applebaum.

since the commencement of the suit, should refuse to surrender possession of the said premises, they, or such person, should be held as in contempt of court.

While the propriety of decreeing in advance what subsequent conduct shall constitute a contempt may well be questioned, yet as it is certain that no valid judgment of contempt could be made without notice and demand, we will not hold that a mere *brutum fulmen* in a decree necessarily invalidates it. *Murphy v. Abbott*, 13 Ill. App. 68.

At most, such matter in the decree can only be said to be indicative of what might be done after a full and strict compliance with all the conditions of notice and demand which established rules of proceeding require in such cases, and we will not enter upon an anticipatory discussion of what may possibly happen. Proceedings in contempt must be carried on *strictissimi juris*, and we will not assume that any other course will be pursued.

But, for the error in decreeing a personal judgment against the appellants and awarding execution thereon, the decree of the Circuit Court is reversed and the cause remanded for a new decree in conformity with this opinion. Reversed and remanded.

Charles Hasterlick et al. v. Abraham Applebaum.

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1. **INSTRUCTIONS.**—*When Error to Direct a Verdict.*—In an action to recover money upon an account, where the statute of frauds is in the way of a recovery but is not in the way of applying payments as the parties have agreed, the question of the agreement should be submitted to the jury.

Assumpsit, for goods sold.—Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed June 1, 1896.

EDWIN F. ABBOTT, attorney for appellants.

EDWARD H. MORRIS, attorney for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Louis Applebaum, son of the appellee, kept a saloon (dram shop) and owed the appellants. Louis "had a little trouble with a brewery," and by some not very definitely shown arrangement the saloon and the account with the appellants were transferred to the name of the appellee.

The testimony warrants the belief that between all the parties named there was an understanding that dealings with the appellants would be continued as before; that payments would be made at short intervals, and such payments should be applied first to the pre-existing account.

The dealings did continue, and after the transfer the appellants sold goods which were charged to the appellee to the amount of \$282.72, and received from him and Lewis \$262.98, a difference of \$19.74, for which the appellants had judgment.

At the time of the transfer Louis owed the appellants \$356.26, so that if all the payments since the transfer were put to the credit of that indebtedness, the appellants ought to have judgment for \$282.72.

There is no evidence which, with the statute of frauds in the way, can charge the appellee with the old account, but that statute is not in the way of applying payments as the parties may have agreed. *Haynes v. Nice*, 100 Mass. 327; 18 Am. & Eng. Ency. of Law, 240 *et seq.*

What the parties did agree should have been left to the jury, but the court instructed them to give the appellants a verdict of \$19.74, and the appellants excepted. For this error the judgment is reversed and the cause remanded.

**L. J. Strause and Callie Mulvany, Co-partners as
Strause & Mulvany v. The Owen Electric
Belt & Appliance Co.**

1. PLEADING—*Adding the Similiter.*—A judgment will not be reversed because of an omission to add a *similiter* to the general issue before going to trial.

2. APPELLATE COURT PRACTICE—*What the Abstract Must Show.*—Matters upon which error is assigned must be made to appear in the abstract.

Assumpsit, for rents. Appeal from the Circuit Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

HAMILTON & FULLENWIDER, attorneys for appellants.

JOSEPH H. FITCH, attorney for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

As to what this case is about, the abstract tells us: “*Narr.* First count, special on a lease, and common counts.” We guess it is an action for unpaid rent, about which there could be no dispute. The appellants’ attorneys becoming engaged in a trial before another court, so that they could not attend to this case, advised the appellants to employ other attorneys, which advice the appellants declined to follow and the case was not attended to at all.

After judgment the appellants applied to have the judgment set aside, first, because there was no *similiter* to the general issue, which in the last generation was characterized by the Supreme Court as a “frivolous objection” (*Gillespie v. Smith*, 29 Ill. 473); second, because the appellants have sustained damages—which are unliquidated—by the failure of the appellee to perform its covenants in some lease made by it to the appellants; but whether it is the

same lease upon which this suit is brought, does not appear by the abstract.

The latest of the numerous cases in which the Supreme Court has said that everything on which error is assigned must appear in the abstract, that has come to our notice, is City Electric Ry. v. Jones, 161 Ill. 47. We do not go beyond the abstract in favor of an appellant.

Then as unliquidated damages can not be the subject of a set-off, unless they grew out of the same subject-matter as the ground of the action (Brooks v. Brady, 53 Ill. App. 155), the abstract does not show that the damages claimed could have been used as a defense to this suit. But if they could the appellants can still sue for their damages. Palmer v. Harris, 98 Ill. 507.

There is no error and the judgment is affirmed.

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James M. Jemison v. The Chicago Contract Construction Company et al.

1. APPELLATE COURT PRACTICE—*When the Court will Look into the Record.*—The principle that the court will not go to the record for matter not shown by the abstract does not apply to omissions which favor the party making the abstract.

2. VERDICTS.—*Recorded One the Real Verdict.*—It is the recorded verdict which controls, not the paper which is returned into court by the jury.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

JOHN N. JEMISON, attorney for appellant.

JACOB R. CUSTER and JOSEPH A. GRIFFIN, attorneys for appellees.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The brief of the appellant cites Lambert v. Borden, 10

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Ill. App. 648, as authority that a verdict for one defendant is not good where there are two, but omits to notice that it is the recorded verdict—not the loose paper which the jury returned into court—that is the real verdict.

Here the recorded verdict is in favor of the defendants in the plural—a feature not shown by the abstract.

The principle that we will not go to the record for matter not shown by the abstract does not apply to omissions which favor the party making the abstract.

It is unnecessary to consider the supposed merits of this case. The appellant did not attempt to show any case against French, but affirmatively proved that he had none.

If there be any error in the case it is no cause for reversing a judgment which, if it had been the other way, could not have stood. Davis v. Johnson, 41 Ill. App. 22; Theodorson v. Ahlgren, 37 Ill. App. 140.

The judgment is affirmed.

Thomas W. Kinser v. Calumet Fire Clay Co.

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1. AGENTS—*To Sell—Power.*—An agent to sell has power to do only what is usual in the course of the business of selling. He is not authorized to make a contract of indemnity.

2. JURY—*Where the Right to Poll Does Not Exist.*—Where an instruction is given to find for the plaintiff, the defendant has no right to poll the jury. GARY dissents.

Assumpsit, for goods sold. Appeal from the Circuit Court of Cook County; the Hon. FRANK ADAMS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

STATEMENT OF THE CASE.

In this case, appellee, The Calumet Fire Clay Company, an Ohio corporation, manufacturers of sewer pipe at Calumet, Ohio, brought suit against the appellant, Kinser, who lives in Terre Haute, Indiana, and who was there engaged as a public works contractor in the line of building sewers and pavements.

A default was taken against Kinser, and shortly thereafter a judgment was entered against him for \$1,973.86. December 14, 1895, the court set aside the judgment upon condition that the defendant execute a bond for the payment of whatever judgment might be rendered. A satisfactory bond and pleas were at once filed by Kinser. The pleas filed thereto were: (1) general issue; (2) satisfaction; (3) set-off, the common counts; (4) special plea of set-off. The plea of set-off sets out that at the instance and request of the plaintiff, defendant entered into a contract with the city of Anderson, Indiana, to construct for said city, within its limits, a system of sewers, for which said city agreed to pay the defendant \$71,850, and at the same time and contemporaneously with the making of said contract, defendant agreed to purchase of plaintiff the sewer pipe necessary to go in said system of sewers, upon the plaintiff representing and agreeing that it would allow him, the defendant, a credit on the purchase price of said sewer pipe equal to the amount, if any, which he, the defendant, might lose in completing the contract with the city of Anderson according to the specifications, at the price of \$71,850; that defendant completed the contract at a cost to him of \$78,000, and has paid to the plaintiff all he agreed to pay it as the contract price for such sewer pipe, except \$1,650; that the plaintiff was active as the work progressed in collecting from the defendant the purchase price of said sewer pipe, and defendant upon the completion of said work found it had cost him more than the contract price; that if he were to pay the plaintiff the amount claimed of him, he would lose on said contract with the city of Anderson, \$6,000. That plaintiff was so informed and requested to account with the defendant, to pay over to him the amount he would lose on said contract over and above \$1,650, all of which plaintiff has refused to do; which said sum of money, which has been overpaid to the plaintiff, to wit, \$6,000, so due from the plaintiff to the defendant as aforesaid, exceeds the damages sustained by plaintiff by reason of the non-performance by the defendant of the several supposed premises in the said

Kinser v. Calumet Fire Clay Co.

declaration mentioned, and out of which said sum of money the defendant is ready and willing and hereby offers to set off and allow to the plaintiff, and this the defendant is ready to verify. Wherefore he prays judgment, if the plaintiff ought to have its aforesaid action against him, and that he may have judgment against the plaintiff for \$4,000.

The case coming on for trial, the plaintiff introduced the following paper, which was signed by Gresham, the former attorney for Kinser, and by plaintiff's attorney, as follows:

“It is hereby stipulated and agreed by and between the parties hereto, that the plaintiff delivered to the defendant the goods for which this suit is brought to the amount and value of the damage assessed on the default heretofore entered in said cause, and set aside, over and above all payments made on account thereof; and this stipulation is made for the purpose of dispensing with formal proof of the delivery of the goods and the amount of payments made on account thereof, leaving the defendant to make proof of any other defense he has set out by his pleadings.”

Signed: WILLIAM P. HAYES, and
SULLIVAN & MCARDLE,
Plaintiff's attorneys.

OTTO GRESHAM,

Attorney for defendant.

No other evidence in chief was introduced by plaintiff.

The defendant testified: “I bought the sewer pipe from Frank Hartford, representing the fire company; that was the only goods sold to me by this company. Mr. Hartford represented to me that he was selling this pipe for the Calumet Fire Clay Company; that he was also interested in the company; that he wanted to sell me the piping; that he wanted me to figure on his goods. I was about to figure on the contract for a sewer at Anderson, Indiana, a public improvement; I was figuring on this for some time. Mr. Hartford was there, in and out the room where I was making the figures on building the sewer at Anderson. He gave me prices, and I made my figures accordingly. He came in during the time, several times, and looked over my figures.

My proposition at that time was something over \$80,000. I had finished up, and he said to me: 'Look here, Kinser, you have got to cut your figures down, or you will be beaten in this bidding.' The bidding was competitive bidding. He said to me I would have to reduce those figures. I said: 'I can't do it and get out on it, on the sewer.'

I was engaged in bidding for a sewer for the town of Anderson, Indiana, and I had a bid made out for \$80,000 for this sewer work, for the purpose of bidding in competition for the purpose of getting all this sewer work in the town of Anderson. And Hartford came to me, and I was figuring on buying the sewer brick from him. He came to me and told me that I should reduce that bid below \$72,000; that another fellow had made a bid of \$72,000; and I says to him: 'I can't do it and come out on it;' and he says: 'If you can do that we will see that you don't lose any money. We want to sell our pipe, and we don't want to sell it to this other party. I want to sell this pipe to you. There is one other man that is going to bid on this contract and I will see that you don't lose any money.' After he made this statement I reduced the bid, under his promise that his company would see me out safe. I reduced it to a shade under \$72,000.

I then got the contract with the town of Anderson; at the time I made these figures, it was arranged that I was to buy the sewer pipe from him; that was a part of the deal; at that time figures were given to me of the price at which the sewer pipes would be sold to me. I think this contract was in May, 1891; I went on and performed this sewer work for the town of Anderson under the bid that I put in at that time, which was accepted by the town of Anderson, and sewer pipe was delivered to me by the plaintiff in this case, and the sewer pipe that was delivered to me was thereafter settled for by me at the price that was originally orally agreed upon by this agent it would be sold me at; I have all the measurements of that settlement.

I lost \$6,000 on this contract with the town of Anderson; no part of that loss has ever been paid to me by the plaintiff."

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Cross-examination:

“The talk I had with Mr. Hartford was at Anderson; I signed this contract (shown witness) at Calumet, Ohio, after I had this talk with Hartford; letter shown me dated December 19, 1892, is in the handwriting of my son, who is my bookkeeper; he was authorized to do my correspondence.”

Letter offered for identification and marked plaintiff's Exhibit 1, is as follows:

“T. W. Kinser & Son, General Contractors,
Sewers and Paving a Specialty.

TERRE HAUTE, IND., Dec. 19, 1892.

Calumet Fire Clay Co., Calumet, O.

DEAR SIRS: Yours received, note contents, and will say that I am going over to Anderson in the morning. The engineer says he thinks he will get the estimate out some time next week, so, just as soon as I get the money you shall be paid in full.

I wish you would have those dishes that I ordered of Bowles forwarded here before Christmas if possible.

I remain, yours repty.,

T. W. KINSER.”

The letter dated August 28, 1894, is in the handwriting of my son. He didn't know of the entire circumstances of the case, but he had authority to transact business for me.

Letter marked for identification, Exhibit 2, as follows:

“T. W. KINSER & Son, Contractors,
Headquarters, Terre Haute, Ind.,
Sewers and Paving a Specialty.

TERRE HAUTE, Ind., Aug. 28, 1894.

Calumet Fire Clay Co., Calumet, Ohio.

DEAR SIRS: We have not sold our bonds yet, and just as soon as we do we shall remit you in full. The market has been flooded with paper, and it is a tedious matter to get them off. However, we expect to soon.

We can not settle before this for we have not the funds to do so.

Yours, very truly,
T. W. KINSER.”

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The letter dated June 26, 1893, was written by my son. Letter offered for identification, marked Exhibit 2, as follows:

“T. W. KINSE^R & SON, General Contractors,
Sewers, Paving and Railroads.

HEADQUARTERS, TERRE HAUTE, IND., June 26, 1893.
Calumet Fire Clay Co., Calumet, O.

DEAR SIRS: Will be in Anderson in the course of ten days and will authorize the city treasurer to turn all moneys over to you to the amount of your account.

Hoping this will meet with your approval, I am,
Respt'y yours,

THOS. W. KINSE^R.”

The court instructed the jury to find a verdict for the plaintiff for \$1,973.86.

HAMLINE, SCOTT & LOED, attorneys for appellant.

WM. P. HAYS and SULLIVAN & McARDLE, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant contends that an agent of the plaintiff, engaged in selling its goods, is presumed to be authorized to sell the same, conditioned that the prices therefor shall be such that the buyer shall not lose anything on a contract he is undertaking.

There is no evidence that the plaintiff ever heard that its agent had so agreed, until this suit was begun, long after the sewer pipe had been sent, received, and put in the ground.

The defendant repeatedly promised to pay in full for the pipe, making no claim for indemnity against loss on his contract.

An agent to sell is not authorized to make such a contract of indemnity as appellant sets up. The consideration which moves an agent when selling does not enlarge his authority.

Kinser v. Calumet Fire Clay Co.

An agent, to sell, has power to do only what is usual in the course of the business of selling. *Hess & Co. v. Heegaard*, 54 Ill. App. 227; *T. W. & W. Ry. Co. v. Elliott*, 76 Ill. 67. *Cooley v. Perrine*, 41 N. J. L. 322; *Story on Agency*, 9th Ed., Sec. 170.

If the defendant had notified the plaintiff that he had bought the pipe upon terms that he should be indemnified against loss, in the manner he now claims, and the plaintiff had thereafter sent the pipe, a different question would be presented.

The instruction to the jury was proper, and counsel had no right to waste the time of the court in an endeavor to make them disregard the instruction the court had given to them. The verdict is, in form only, that of the jury, as the judgment is, in form only, that of the court.

The finding and judgment are such as the law pronounces upon the undisputed facts.

Counsel, after such an instruction had been given, had no right to poll the jury; it was their duty to obey the instruction of the court, and for counsel to insist upon polling them was, in effect, to ask each juror if he obeyed the instruction of the court—discharged his duty.

The judgment of the Circuit Court is affirmed.

MR. PRESIDING JUSTICE GARY.

I dissent as to the polling of the jury, not that there is any sense in doing it, but because it is part of the system of this State that the jury shall be at liberty to disregard the law.

But in all seriousness, it is a dangerous power with which to intrust a judge, that he may give a direction which a jury shall obey, or that he may, without the assent of the jury, enter as a verdict what the jury never found.

If he may do so in a case where the proof is clear and beyond possibility of doubt, then it is in his province to decide when that case exists.

The liberty of Englishmen has in former times stood upon denying that power to a judge. *Penn's Case*, 6 Howell St. Tr. 951; *Bushel's Case*, *Vaughn's Reports*, 135.

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Charles H. Eckman v. Chicago, B. & Q. R. R. Co.

1. RAILROADS—*Release of Action by Member of Relief Department.*—An employe of the Burlington Railroad Company, who belonged to its relief department, in joining, agreed in writing “that in consideration of the amounts paid and to be paid by said company for the maintenance of the relief department, the acceptance of benefits from said relief fund for injury or death should operate as a release and satisfaction of all claims for damages against said company, arising from injury or death, which could be made by him or his legal representatives. In an action for damages resulting from an injury, *it was held* that the release contained in the agreement was a defense to the action.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

OTTO GRESHAM and CHARLES ALLING, attorneys for appellant, contended that a railroad corporation of this State can not, by contract in advance, exempt itself if from liability to its employes for its gross negligence. Chicago, R. I. & P. R. R. Co. v. Harnon, 17 Ill. App. 640; Chicago, B. & Q. R. R. v. Maney, 49 Ill. App. 105; Illinois C. R. R. Co. v. Reed, 37 Ill. 485.

CHESTER M. DAWES and FRANK O. LOWDEN, attorneys for appellee.

The law has always favored the amicable adjustment of claims. We know of no reason why, after an injury received, a plaintiff should not be permitted to say he will take a certain amount in satisfaction of his claim, whether such amount was specified in a book of regulations or fixed by agreement of the parties at the time. The precise question involved has been presented to many courts, and has been uniformly answered against the plaintiff, except in a single case.

The cases in which this and similar relief departments have been sustained are as follows: C., B. & Q. v. Bell,

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(Neb.) 62 N. W. Rep. 314; Johnson v. Phila. & Reading R. R. Co., 29 Atl. Rep. 854; 163 Pa. St. 127; Leas v. Penna. Co., (Ind.) 37 N. E. Rep. 423; Donald v. C., B. & Q. R. R. Co., (Iowa) 61 N. W. Rep. 971; Ringle v. Pa. Company, (Penn.) 30 Atl. Rep. 492; State use of Black v. B. & O. R. R. Co., 36 Fed. Rep. 655; Fuller v. B. & O., (Md.) 10 Atl. R. 237.

OPINION PER CURIAM.

This is an action on the case. The appellant, wh9 was the plaintiff in the court below, on August 29th sustained injuries while in the employ of the appellee, who was defendant below. Evidence was offered by the plaintiff tending to show negligence on the part of the defendant. It appeared on behalf of the defendant that the plaintiff was a member of what is known as the Burlington Relief Department, which is one of the departments of the defendant's service.

The object in establishing the relief department is declared to be "the establishment of a fund, to be known as the relief fund, for the payment of definite amounts to employes contributing thereto, who are to be known as members of the relief fund, when under the regulations they are entitled to such payment, by reason of accident, or sickness, or in the event of their death, to the relatives or other beneficiaries designated by them." The relief fund consists of voluntary contributions from employes of the railroad company, income derived from investments, and interest paid and appropriations made by the railroad company. The railroad company has general charge of the relief department, guarantees the fulfillment of its obligations, takes charge of all moneys belonging to the relief fund, and makes itself responsible for the safe keeping of such moneys, pays to the relief department interest at the rate of four per cent per annum on monthly balances in its hands, supplies the necessary facilities for conducting the business of the relief department, and pays all the expenses thereof. There is also an advisory committee, which has general supervision of the operations of the relief department. This committee

is composed of five members of the board of directors of the railroad company, and the contributing employes on each division of the railroad company furnish one member of the committee, and the general manager of the railroad company is *ex-officio* a member and chairman of such committee.

The moneys received for the relief fund are held by the company in trust for the relief department. Any money not required for immediate use is invested under direction of the advisory committee. All employes of the railroad company who are contributors to the relief funds are designated as members of the relief fund. No employe of the railroad company is required to become a member of the relief department. All employes of the railroad company who volunteer to and do become members of the relief department are divided into classes according to the monthly wages received. Each member contributes monthly a specified sum according to the class to which he belongs. All employes of the railroad company who pass a satisfactory medical examination, are possessed of good moral characters, are eligible for membership in the relief department. If a contributing member is under disability—that is, if he is unable to work, whether such disability arises from an injury received while at work or arises from sickness—he is entitled to be paid from the relief fund a certain sum per day. This amount varies, according to the contribution which the employe is making at the time his disability occurs. In case of the death of the employe, the beneficiary designated by him is entitled to be paid a specified sum according to the contract of membership which the deceased held.

The employes of the railroad company, in order to become members of the relief department, make an application to it in writing, and in this application among other things they agree: "That in consideration of the amounts paid and to be paid by said (railroad) company for the maintenance of the relief department, the acceptance of benefits from said relief fund for injury or death, shall operate as a

Eckman v. C. B. & Q. R. R. Co.

release and satisfaction of all claims for damages against said company arising from such injury or death which could be made by me or my legal representatives."

The relief department was organized on June 1, 1889. August 31, 1891, two days after the accident to plaintiff, the defendant had paid for operating expenses alone of the relief department, \$82,958.98. It had also advanced toward the payment of benefits during such time on account of the insufficiency of contributions of members, the sum of \$10,128.19. From June 1, 1889, to April 30, 1892 (this suit having been brought on May 4, 1892), the defendant paid for operating expenses of the relief department from its funds \$110,538.63. On the 31st day of December, 1891, in accordance with its regulations, it crossed off charges against the relief fund for deficiencies which accrued up to that time, amounting to \$20,275.55. It had advanced on account of further deficiencies accruing from January, 1892, to April 30, 1892, the sum of \$19,441.27, making a total paid and advanced by the company from June 1, 1889, to April 30, 1892, of \$150,255.45.

The amount paid by the defendant on account of sickness, and death from sickness, from June 1, 1889, to April 30, 1892, was \$225,978, and the amount paid on account of accident, and death from accident, was \$245,281.49. This latter amount included benefits, whether the injury received was while the employee was on or off duty.

The plaintiff made application for membership on July 18, 1890, and was duly accepted. He received in benefits the sum of \$245, being the amount specified in the regulations to which he was entitled. He was also paid on account of the injury for nurses, medicine and surgical attendance a further sum of \$121.90.

It was not disputed at the trial that these payments were made to the plaintiff and received by him in accordance with the rules and regulations of the relief department, of which he was a member, and were paid to him on account of the injury for which he brings this suit.

The defendant relied upon the facts above set forth as a

bar to the action, and the trial court directed a verdict in its favor.

The appellant assigns for error in this court such direction of the court below. The points upon which he relies are:

First. The Burlington Relief Association, as organized, and the method of its maintenance, is contrary to the public policy of this State.

Second. The contract of release made by appellant with appellee through the so-called relief association is *ultra vires* and void.

Third. If appellee can go into the insurance business, it must comply with the insurance laws of this State.

Fourth. Appellant should have been permitted to go to the jury as to whether the association was in fact voluntary.

Fifth. It was a question for the jury as to whether appellant joined of his own free will, or was coerced into joining.

Sixth. It was a question for the jury whether in view of the fact that appellant was under the influence of opiates at the time of receiving the first payment from the relief association, he in fact released the appellant by receiving part of what he was entitled to receive from the association.

This case presents a question of great and permanent interest, which has never, so far as we are advised, been discussed in this State. The validity of such a defense as the appellee makes has been affirmed by many cases elsewhere, and we adopt the result, without committing ourselves to the whole argument, of C., B. & Q. R. R. v. Bell, 44 Neb. 44; 62 N. W. Rep. 314, which is a case not distinguishable from this. The questions raised by the last three errors assigned, would, if discussed, call for a review of considerable evidence, but as that discussion would be of no benefit to anybody, we content ourselves with saying that no error in those particulars was committed.

The judgment is affirmed.

Baumgartner v. Hoeft.

Anna Baumgartner v. Gottfried Hoeft and Bertha Hoeft.

1. **LIMITATIONS—*Plea of, to Amended Counts.***—Where an amended count to a declaration is filed after the statute of limitations has run, and sets up a cause of action different from that originally declared on, to maintain which different proof is required, and as to which defenses, not pertinent to the original declaration are applicable, a plea of the statute is properly sustained.

Trespass on the Case, for malicious prosecution. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

STATEMENT OF THE CASE.

This was an action of trespass on the case brought by Anna Baumgartner, appellant, against Gottfried Hoeft and Bertha Hoeft, for an alleged malicious prosecution, arrest and imprisonment. The acts of which complaint is made took place on the 20th day of July, A. D. 1892. Appellant, together with her husband, Phillip Baumgartner, filed their declaration in the Superior Court of Cook County on the 8th day of August, 1892.

On June 5, 1895, the said action being still pending, an order of court was entered discontinuing the same as to the plaintiff, Phillip Baumgartner, and appellant was given leave to file an amended declaration in the said cause *instanter*.

Thereupon an amended declaration was filed on the 5th day of June, A. D. 1895.

On the 12th day of June, A. D. 1895, the appellees filed their pleas of the general issue to the said amended declaration, and each and every count thereof.

On the 14th day of November, A. D. 1895, the court entered an order allowing appellees to file additional pleas *instanter*, and thereupon they filed a plea of the statute of limitations to the second count of the amended declaration.

On the 26th day of November, A. D. 1895, appellant filed her demurrer to the plea of the statute of limitations.

On November 30, 1895, appellant's case was dismissed as to all the counts of her declaration, except the second count, and the court, after hearing the arguments of counsel, and being fully advised, overruled the demurrer of the appellant to appellees' plea of the statute of limitations and rendered judgment against appellant for costs, and gave appellees execution for same, from which judgment appellant prosecutes this appeal.

The amended declaration filed June 5, 1895, charged that the appellees, on the 20th day of July, A. D. 1892, aforesaid, in Chicago, county and State aforesaid, "falsely and maliciously and without any reasonable or probable cause whatsoever, conspired with one Clara Bornwasser and induced and coerced and compelled the said Clara Bornwasser, who was a servant of the defendants and under their control, to charge the plaintiff, Anna Baumgartner, with having committed certain offenses punishable by law, to wit, an assault and battery, and making threats. Yet the defendants, well knowing the premises, but contriving and maliciously intending to injure the plaintiff in her aforesaid good name, fame and credit, and to bring her into public scandal, infamy and disgrace and to cause the plaintiff to be imprisoned for a long space of time, and thereby to impoverish and ruin her, on the day aforesaid, in Chicago, in the county and State aforesaid, induced, coerced and compelled the said Clara Bornwasser to appear before one Max Eberhardt, then and there being one of the justices of the peace in and for said county aforesaid, falsely and maliciously and without any reasonable or probable cause whatsoever, charge the plaintiff with having committed the crimes of assault and battery and making threats, and upon such charges the defendants falsely and maliciously and without any reasonable or probable cause whatsoever as aforesaid, caused and procured the said Max Eberhardt, so being such justice as aforesaid, to make and grant his certain warranty under his hand for the apprehending and taking of the plaintiff."

O'DONNELL & COGHLAN, attorneys for appellant, contended that a plaintiff may restate his cause of action by way of

Baumgartner v. Hoeft.

amendment in a pending action, without its being obnoxious to the objection of introducing new causes of action at any time before trial, by leave of court. Illinois Central Railroad v. Cobb et al., 64 Ill. 128; Dickson v. C., B. & Q. R. R. Co., 81 Ill. 215; United States Ins. Co. v. Ludwig, 108 Ill. 514.

A recovery under the first count would have been a bar to a recovery under the second count of the declaration, and that is decisive of the identity of the cause of action. Insurance Co. v. Thomas, 10 Ill. App. 553; Dickson v. C., B. & Q. Ry., 81 Ill. 215; C. & A. R. R. Co. v. Henneberry, 153 Ill. 354.

The courts are liberal in allowing amendments to avoid the running of the statute of limitations where the amendment but restates the cause of action originally stated. Illinois Central Railroad Co. v. Cobb et al., 64 Ill. 128; North Chicago Rolling Mill Co. v. Monka, 107 Ill. 340; Thomas v. Fame Ins. Co., 108 Ill. 91; Smith v. Taggart, 21 Ill. App. 538.

An amendment can not be regarded as introducing a new cause of action where it merely restates the cause originally set up, but in a different form. Mitchell v. Milholland, 106 Ill. 175.

An additional count filed after the lapse of the statutory period is not barred where it is merely by way of amendment and restatement of the cause of action originally declared on. Blanchard v. Lake Shore, etc., Ry., 126 Ill. 416; 27 Ill. App. 22; Chicago N. W. Ry. Co. v. Trayes, 17 Ill. App. 136.

SULLIVAN & HEALY, attorneys for appellees.

Where an amendment or additional count brings forward a new or different cause of action it is regarded and treated as a new suit, began at the time when such amendment or additional count is filed, and the statute is arrested at the latter date, and such amendment or count introducing a cause of action barred by limitation is ineffectual to avoid the statutory bar. Fish v. Farwell, 160 Ill. 236; Chicago, B. & Q. R. R. Co. v. Jones, 149 Ill. 361; Phelps v. Illinois

Central R. R. Co., 94 Ill. 548; Illinois Central R. R. Co. v. Cobb, Christy & Co., 64 Ill. 128; North Chicago Rolling Mill Co. v. Monka, 107 Ill. 340; Illinois and St. Louis R. R. and Coal Co. v. People, 19 Ill. App. 141; Peoria and Pekin Union Ry. Co. v. United States Rolling Stock Co., 28 Ill. App. 79.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The declaration first filed charged that appellees, "on the 5th day of July, A. D. 1892, in Chicago, in the county and State aforesaid, went and appeared before one Max Eberhardt, Esquire, then and there being one of the justices of the peace in and for the said county aforesaid, and then and there before the said Max Eberhardt, Esq., being such justice as aforesaid, falsely and maliciously and without any reasonable or probable cause whatsoever, charged the plaintiffs with having committed the crime of assault and battery; and upon such charge the defendants, falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said Max Eberhardt, so being such justice as aforesaid, to make and grant his certain warrant, under his hand, for the apprehending and taking of the plaintiffs, and for bringing the plaintiffs before him, the said Max Eberhardt, or some other justice of the peace in and for said county, to be dealt with according to law for the said supposed offense; and the defendants under and by virtue of the said warrant, afterward, to wit, on the day aforesaid, there wrongfully and unjustly, and without any reasonable or probable cause whatsoever, caused and procured the plaintiffs to be arrested and imprisoned and kept in prison for the space of two hours next following."

The amended declaration set up a cause of action different from that originally declared on, the maintenance of which required different proof, and as to which defenses not pertinent to the first would have been applicable. Fish v. Farwell, 130 Ill. 236; Illinois Steel Co. v. Eylenfeldt, No. 6055, Oct. Term, 1895, 1st Dist. Ill. App.

The judgment of the Superior Court is affirmed.

Wright v. Cudahy.

64 453
168 86**Austin W. Wright and William W. Catlin, his Assignee,
v. John Cudahy.**

1. **CONTRIBUTION—*Between Copartners.***—A bill for contribution by one partner against his copartner before he has paid his share of the firm debts, there being no firm assets, will not lie.

2. **PARTNERSHIP—*Rights of Creditors—Equity—Jurisdiction.***—Creditors of a partnership may maintain a suit at law, obtain judgment against either partner or the firm, and satisfy the judgment out of the joint or private property of the partners, and there is no reason why a court should entertain a bill by one partner for the benefit of such creditors.

Bill for Contribution.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

STATEMENT OF THE CASE.

This is a bill for contribution brought by Austin W. Wright and his assignee, W. W. Catlin, against John Cudahy, on account of a transaction in pork which culminated on August 31, 1893, and resulted in the failure of the complainant, Wright.

The complainant, Wright, and the respondent, Cudahy, were members of the Board of Trade during the spring and summer of 1893, and for a long time previous thereto. Some time in April, 1893, Wright conceived the idea of buying a large quantity of pork, to be delivered at various times up to August 1st.

In accordance with this plan, Wright commenced the purchase of pork about the first of April, and by the middle of the month had bought about 37,000 barrels at a price averaging about \$17 or \$18 a barrel. During the month of April, Wright had on hand about \$300,000, all of it subject to immediate call.

Some time about the middle of April, he determined to invite Mr. Cudahy to join this deal, so that they would be better able to handle the amount of pork that he thought

desirable to buy in order to carry out his plan. Mr. Cudahy, after considering the matter for a day or two, gave his assent and thereupon it was agreed that each one should buy such pork as he saw fit, at any time and at any price, without regard to the other, and all of this should be kept for joint account.

The same kind of a deal had been run by these two parties the year before in short ribs.

Wright & Cudahy continued in this deal up to about the 31st day of May, at which time they had accumulated about 117,000 barrels of pork, worth in the neighborhood of \$20 per barrel.

On the 31st day of May, or the day before, Mr. Cudahy came to Mr. Wright and informed him that his brothers, with whom he was interested in large business transactions, had objected seriously to his deal with Wright, and that the rumor of the joint transactions in pork was affecting the credit of the Cudahy brothers, and for this reason he desired to get out of the deal.

Up to this point there is no controversy between the complainants and defendant as to the facts of the case. Complainant Wright says that on this 31st day of May Mr. Cudahy requested Wright to let him out of the deal nominally, but at the same time it was agreed and understood that this was only for the purpose of satisfying Mr. Cudahy's brothers, and avoid their criticism, and that he should remain a real partner to the end of the transaction. On the other hand, Mr. Cudahy contends that on the said 31st day of May the partnership was actually dissolved, and that thereafter he had no interest whatever in the deal.

Immediately after the agreement on the 31st day of May, the various accounts, whether standing in the name of Cudahy or Wright & Cudahy, were transferred to Wright, and nominally almost all the matters were turned over to Wright's account. On the 1st day of August Mr. Wright was unable to meet the payments for the pork then to be delivered, and was obliged to suspend. On the same day Mr. Cudahy and several other large concerns on the board,

Wright v. Cudahy.

doing commission business, failed as well. This action was brought to enforce the liability of Mr. Cudahy as a partner in the transactions and compel an accounting between the parties.

The dispute between these parties, so far as the facts are concerned, is as to the nature of the arrangement made between Cudahy and Wright on the 31st day of May, after they had entered into this partnership agreement. Mr. Wright contends that there was no absolute dissolution of partnership, but that matters were to continue exactly the same so far as the parties were concerned until the deal was finally consummated. Mr. Cudahy contends that the dissolution was absolute at this date, and that thereafter no liability existed. The testimony of the two parties is contradictory.

S. S. GREGORY and DARROW, THOMAS & THOMPSON, attorneys for appellants.

W. J. HYNES and H. T. GILBERT, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is a bill by an alleged partner for contribution from his alleged copartner.

It is urged by counsel that it is also a bill for exoneration; that is, that by the payment of partnership debts by the defendant Cudahy, the complainant Wright may be relieved from the burden of debts now resting upon him. It can not be called or maintained as a bill for an accounting, as not only is there no dispute as to the accounts, but all the transactions concerning which the controversy is, were personally carried on by the complainant in his name, and ostensibly not as a partner, and the entire accounts were kept by Wright, and are in the possession of the complainants. The defendant is not asked to account for anything; he is asked, simply, to pay into the hands of a receiver, to be appointed, the amount of the unpaid indebtedness of the

alleged firm, viz.: the sum of \$357,937.45, that the same may be distributed among such creditors:

The total loss upon the transactions described in the bill was \$582,107.41, of which Wright, prior to his failure, paid.....	\$202,520.49
His assignee has since paid.....	18,754.44
There was deducted from a certain check.....	2,895.03

Total amount paid by Wright.....	\$224,169.96
Leaving amount unpaid.....	357,937.45

Wright, according to his claim, should pay of the total loss \$291,053.70; deduct \$224,169.96; leaves \$66,883.74 as the amount which, according to his claim, he ought, as between him and Cudahy, to pay.

We are in this case confronted with the question whether a bill of this kind can be maintained by a partner who has not paid his share of the firm indebtedness, there being no partnership assets.

We have been referred to no case, and we are not aware of any, in which such a bill has been entertained.

Courts sit for the redress of grievances, and they act only at the instance of those who have a right to insist that they shall.

What grievance of the complainants, or either of them, is shown by the bill filed in this cause, and what right have those who brought this bill to require the court to give to them redress?

The complainant, Wright, says that he has paid \$224,169.96 of firm indebtedness, leaving \$357,937.45 unpaid; which unpaid amount rests, a heavy burden, upon him, and which the defendant Cudahy should remove; but, if the allegations of the bill be true, the burden of the unpaid debts rests also upon Cudahy, and is to him as burdensome as it is to Wright. Wright does not offer to pay one-half of the firm indebtedness if Cudahy will pay the other half. It is not claimed that Cudahy owes Wright anything; the insistence is that Cudahy owes firm creditors a large sum, and does not pay them; a decree that Cudahy pay anything to Wright is not

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asked. Clearly, then, it is the firm creditors who alone have a right to complain; it is they alone to whom injustice is being done. The bill is for the benefit of parties who do not ask for relief, who are not parties to the proceeding, and may never become so. If the bill could be maintained for the benefit of firm creditors, it would amount to giving such creditors an opportunity to prove their claims in a court of equity, and deprive Cudahy of the right to deny the partnership, and, consequently, the existence of any claim against him in a court of law and before a jury.

If the allegations of the bill be true, each of the unpaid creditors may maintain a suit at law and obtain judgment against Cudahy. Why, then, should a court of equity suffer Cudahy to be drawn before it for their benefit. The creditors have only a right of action at law against the partners, on which they may obtain judgment, and then satisfy the judgment out of the joint or private property of the partners. *Ladd v. Griswold et al.*, 4 Gil. 25-37.

The rule as to the maintenance of a bill for contribution by a co-surety seems to afford a guide in such a case as this.

It is only a surety who has paid more than his proportion of the joint obligation who can maintain a bill for contribution by his co-surety. *Adams' Equity*, 7th Am. Ed., 269; *Brandt on Guaranty and Suretyship*, Sec. 287; *Lytle v. Pope*, 11 B. Monroe, 309; *Van Patten v. Richardson*, 68 Mo. 379; *Ex parte Gifford*, 6 Vesey, 805; *Gross v. Davis*, 87 Tenn. 226.

In *Hodgson et al. v. Baldwin et al.*, 65 Ill. 532, 537, the court say:

“The first point made by plaintiffs in error is, that one partner, assuming this association to be partnership, can not, when the partnership funds are exhausted and it is still in debt, compel a copartner, by bill in chancery, to contribute toward the discharge of the joint indebtedness, the party suing not having himself paid his own ratable share of such debt.

Counsel seem to consider this a bill for contribution by one or more partners against their copartners, and has so

argued the case. Was it such a bill, the authorities he has cited would sustain his position. The doctrine is well settled, when two or more are jointly, or jointly and severally, bound to pay a certain sum of money, and one or more of them is compelled to pay the whole debt, or more than his or their share, those paying may recover from the delinquents the proportion they ought to pay.

This principle is quite familiar, and was recognized by this court in *Johnson's Adm'r's v. Vaughn*, *ante*, 425."

We are therefore of the opinion that Wright, not having paid his share of the alleged firm indebtedness, this bill can not be maintained.

The complainant Wright admits that it was given out to the world that the partnership between him and Cudahy had been dissolved, but he says that in fact there was no dissolution. Upon the fact of a dissolution, as was represented, the burden rests upon him who declares that his representations were untrue. The apparent is presumed to be the real until it is shown to be otherwise. The presumption of dissolution is based upon the statement of each of the partners, that the firm had been dissolved.

The testimony before the chancellor was partly oral and partly by depositions; the finding of the court below comes to us, therefore, with the force and effect of the verdict of a jury. We perceive in the evidence no sufficient reason for reversing the conclusion of the Circuit Court as to the facts, and its decree is affirmed.

Michael C. McDonald v. The Western Tube Company.

1. PARTNERSHIP—*Liability of Partners*.—One partner can not be held liable upon a note given by his firm without his knowledge, consent or ratification for a consideration, to which the payee knew the firm in whose name it was given, was a stranger.

2. PRACTICE—*Error in Instructions*.—To present the question of error on instructions, the bill of exceptions need not contain all the evidence. Enough to show the pertinency of the instruction is sufficient.

McDonald v. Western Tube Co.

Assumpsit, on a promissory note. Appeal from the Superior Court of Cook County; the Hon. **HENRY V. FREEMAN**, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed June 1, 1896.

EDWARD MAHER and **CHARLES C. GILBERT**, attorneys for appellant; **A. B. JENKS**, of counsel.

ASHCRAFT, GOORDON & COX, attorneys for appellee; **IRA C. WOOD**, of counsel.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

July 1, 1889, the appellant formed a copartnership with Michael J. Tierney under the name of **M. J. Tierney & Co.**, and put his brother Edward S. McDonald into it, as his representative. The business was to be the manufacture, buying and selling of all goods relating to machinists' supplies and everything to said business belonging.

July 11, 1890, Edward S. McDonald, Michael J. Tierney and B. B. Maginn, organized another firm, which they called the **Globe Steam Heating Company**, for manufacturing, constructing, repairing and selling steam and water heating and ventilating apparatus.

The appellant sought to defend upon the ground that the note upon which judgment has been recovered in this case was for goods only appropriate to the business of, and sold to, the last named firm, and that without his knowledge, consent or ratification, the note of the firm in which he was a partner was given for the debt of the other firm. That was in effect the only question in issue.

Witnesses on the side of the appellant did testify that the goods were sold by the appellee to the **Globe Company**; that a note of the other firm was given for the price of the goods, and after some renewals, the note sued upon finally ended the transactions.

It is not claimed by the appellee that the appellant had actual notice of these transactions, but it insists in effect, that the **Globe Company** was only a name in which the busi-

ness of the firm in which the appellant was a partner, was conducted; that the appellee knew nothing of the Globe Company; sold the goods to the firm of the appellant, and that at all events it was entitled to recover because, having sold the note prior to this one, and being applied to by the firm of the appellant to renew it, the appellee furnished the money to pay that note, and took the one in suit for that money, which was a new consideration of which the firm of the appellant had the benefit. This condensation of the positions of the parties is dug out of a mass of testimony given on a trial which begun December 17, 1895, and ended January 3, 1896.

Now these were questions of fact for the jury as to the origin of the transactions resulting in the note in suit.

If the goods were sold to the Globe Company upon the credit of that company, and if it was a separate concern from the firm of the appellant, the appellee could not hold the appellant upon any paper given by the firm in which he was a partner—if such paper was given without his knowledge, consent or ratification—the consideration of which ran back to, or was in continuation of, the series of which the note given for the price of the goods was the first. If the appellee sold the goods to the Globe Company, it knew what it had done, and could not hold the appellant liable upon a note given by his firm, without his knowledge, consent or ratification, for a consideration to which the appellee knew that the firm in whose name it was given was a stranger. *Gray v. Ward*, 18 Ill. 32.

Nor is the case any stronger by the fact that when notes given in the name of the firm became due, and by the act of the appellee were in the hands of *bona fide* holders, who might have enforced them against the appellant, the appellee advanced money to the offending partner of the appellant to pay a note which the appellee knew that the appellant ought not to be required to pay.

No case against the appellant could be thus manufactured. Had the appellee, instead of furnishing money to take up the notes, taken them up itself, under its presumable obli-

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gation as indorser, it would thereby have been reinstated in its first condition as payee. Sweet v. Garwood, 88 Ill. 407; Bond v. Storrs, 13 Conn. 412.

The form of advancing the money to the offending partner with which to pay the holder instead of paying the holder direct can not change the substance.

This opinion will not, or ought not to, be understood as indicating any opinion by this court on the facts; but only as holding that the credibility of the witnesses who testified to alleged facts, should have been left to the jury. The transactions with the appellee, whoever may have been the other party, were in the fall of 1891. The note sued upon was dated May 20, 1892.

In the interval the firm of the appellant had, if not with his previous consent, at least with his subsequent ratification, bought the assets of the Globe Company, but without assuming its liabilities. That transaction does not affect the relations of the parties to this suit.

The court instructed the jury absolutely to find for the plaintiff. This was error, and the judgment is reversed and the cause remanded.

The criticism upon the bill of exceptions is in effect that it has no formal commencement, but it has a formal conclusion, and is sufficient. Reversed and remanded.

MR. PRESIDING JUSTICE GARY ON PETITION FOR REHEARING.

The petition says "the court erroneously assumes that witnesses on the side of the appellant testified that the goods * * * were sold by the appellee to the Globe Steam Heating Company."

The original brief of the appellee says, speaking of witnesses for the appellant, "swore to the purchase of goods by that firm," and the abstract states some of the testimony thus:

"This (the note sued upon) is the renewal of a note that was given eight or nine months previous to this for a lot of goods that were ordered."

"The former note was given to the agent as security for

payment of goods received by the Globe Steam Heating Company." M. J. Tierney & Co. "had no transactions with the plaintiffs at any time." "At the time of the giving of the note I knew what goods had been sold to the Globe Steam Heating Company. They were sold through Agent Duger (he was agent of the appellee). Duger did his talking with B. B. Maginn, the manager of the Globe Company." Invoices "were made out, Western Tube Company to Globe Steam Heating Company."

Without quoting more, I think the petition "erroneously assumes" the want of testimony on that subject; and therefore a peremptory instruction—in effect—to disregard the testimony, was error.

To present the question of error on instructions, the bill of exceptions need not contain all the evidence. *Sidwell v. Lobly*, 27 Ill. 438; *Peoria P. & J. R. R. v. McIntyre*, 39 Ill.; *Gallagher v. Brandt*, 52 Ill. 80.

Enough to show the pertinency of the instruction is enough. 3 Ency. Pl. & Pr. 451; *Penna. Co. v. Swan*, 37 Ill. App. 83, and cases there cited.

The slovenly document which the appellee thinks ought not to be considered a bill of exceptions, begins:

"STATE OF ILLINOIS } ss. In the Superior Court of Cook
Cook County. } County.

WESTERN TUBE COMPANY
v.
MICHAEL J. TIERNEY,
MICHAEL C. McDONALD.

Bill of exceptions.

Transcript of testimony taken on the trial of above entitled cause, before the Honorable Henry V. Freeman, one of the presiding judges of the Superior Court of Cook County, begun December 17, 1895, ending January 6, 1896."

Then is entered what appears to be the complete history of a very tumultuous trial, and ends with: "Inasmuch as the matters and things herein contained do not fully appear of record, the defendant tenders this his bill of exceptions, and prays that the same may be signed and sealed by the judge

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of this court, pursuant to the statute in such case made; which is done accordingly this 11th day of February, 1896.

HENRY V. FREEMAN, [SEAL.]

Judge of the Superior Court of Cook County."

We must regard that document as a bill of exceptions. It was so understood by all. Close criticism is not to be encouraged. *Daube v. Tennison*, 154 Ill. 210; *Ames & Frost v. Stachurski*, 44 Ill. App. 310; 145 Ill. 192.

The petition for a rehearing is denied.

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173 414

Joshua S. Seaverns v. The Presbyterian Hospital.

1. **TRUSTEES—Who are Not—Application of Purchase Money.**—The fact that a person loaning money upon land has an interest in having the money applied in the first instance to the clearing off of a prior mortgage, is not sufficient to constitute him a trustee for that purpose.

2. **NOTICE—To an Agent, When not to His Principal.**—The fact that a loan agent who negotiated a loan secured by mortgage deed, had notice of the purpose for which the money was borrowed and the purpose to which it was to be applied, does not amount to notice to the lender and thereby constitute him a trustee to see that it is so applied.

3. **SAME—To an Agent.**—Notice of facts to an agent is constructive notice to the principal, where it arises from, or is at the time connected with the subject-matter of his agency.

Mortgage Foreclosure.—Error to the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

PENCE & CARPENTER, attorneys for plaintiff in error, contended that any knowledge or information possessed by an agent at the time of acting as agent for a corporation, with respect to the matter upon which he is to act, is notice to the corporation, and notice to an executive officer or managing agent is notice to the corporation itself, if it relates to matters within the scope or duties of such agent. 1 Morawetz on Cor., Sec. 540; Mecham on Agency, Secs. 718-721; *Holden v. N. Y. etc., Bank*, 72 N. Y. 286; *Union Bank v.*

Campbell, 4 Humph. 394; Waynesville Nat. Bank v. Irons, 8 Fed. Rep. 1; Hart v. Farmers Bank, 33 Vt. 252; Fulton Bank v. N. Y. & S. Canal Co., 4 Paige 127; Mayor v. 10th Nat. Bank, 111 N. Y. 457; Bank of Pittsburg v. Whitehead, 36 Am. Dec. 186 to 200, and note; N. M. Hills Mfg. Co. v. Camp, 49 Wis. 130; Houseman v. Girard Mutual Bldg. Co., 31 Pa. St. 256; Dresser v. Norwood, 17 Com. Bench 466; The Distilled Spirits, 11 Wall. 367.

Subsequent ratification or acquiescence have the same effect as prior authority. G. C. & S. R. R. Co. v. Kelly, 77 Ill. 426; Alcott v. Tioga R. R. Co., 27 N. Y. 558; Bank of U. S. v. Dandridge, 20 Wheat. 64.

The rule is that the knowledge or notice possessed by an ordinary agent who deals adversely with a corporation, and in his own interest is not binding, but the exception is that a president or chairman of a finance committee, or other executive officer of a corporation having the power and control and management of concerns of a corporation, though he acts in his interest, and in fraud of the rights of the corporation, will bind the same, where he possesses the knowledge, or has notice upon any given subject. Bank of U. S. v. Davis, 2 Hill 454; Union Bank v. Campbell, 4 Humph. 394; Holden v. N. Y. & Erie Bank, 72 Ill. 286; Mayor v. 10th Nat. Bank, 111 N. Y. 446-457; Village of Port Jervis v. First Nat. Bank, 96 Ill. 558; First Nat. Bank of Milford v. Town of Milford, 36 Conn. 93; Mechanics Bank v. Schaumberg, 38 Mo. 228; North River Bank v. Aymar, 3 Hill 262; Nat. Security Bank v. Cushman, 121 Mass. 490; In re Carew's Estate, 31 Beavan 39; Powles v. Page, 17 C. B. (3 M. G. & S.) 16; Morawetz on Corporations, Sec. 540.

Duty of a corporation, having knowledge of the way in which the proceeds of sale of security were to be applied upon specific debts, requires it to see to the application of the purchase money. 2 Perry on Trusts, Secs. 597, 598, 790, 796; 1 Lewin on Trusts, *pages 453, 457, 462; Forbes v. Peacock, 12 Simons, 590; Duffy v. Calvert, 6 Gill. (Md.) 487, 517; Skeel v. Stocker, 11 Brad. 143; Mecham on Agency, Secs. 780, 785, 786; Blair v. Sennott, 134 Ill. 87.

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GREEN, ROBBINS & HONORE, attorneys for defendant in error.

The rule of the application of the purchase money was adopted in early times to protect those interested in trust estates. It is opposed to all modern methods of doing business. It has no place in the law of agency. Its wisdom is even questioned as applied strictly to trust estates. The tendency has been to restrict rather than to enlarge the field of its application.

Story's Eq. Juris., section 1124, quotes Sir William Grant as making it questionable, whether the admission of the doctrine is not, in general, productive of more inconvenience than real good; for, although in many instances, it is of great service to the *cestui que trust*, as it preserves his property from peculation and other disasters, to which, if it were left to the mere discretion of the trustee, it would necessarily be subject; yet, on the other hand, it creates great embarrassment to purchasers in many cases; and especially where, as in cases of infancy, the parties in interest are incapable of giving a valid assent to the receipt and application of the purchase money by the trustee, and Mr. Story, after discussing the rule, says:

§ 1135. "These are some of the most important and nice distinctions which have been adopted by courts of equity upon this intricate topic; and they lead strongly to the conclusion, to which not only eminent jurists, but also eminent judges, have arrived, that it would have been far better to have held in all cases that the party having the right to sell had also the right to receive the purchase money, without any further responsibility on the part of the purchaser as to its application."

The law in England has been much restricted by statute. Lord St. Leonard's Act, 22 & 23 Vict., c. 35, s. 23; Lord Crainworth's Act, 23 & 24 Vict., c. 145, s. 29; 44 & 45 Vict. c. 41, secs. 36 and 71; Perry on Trusts, sec. 798.

"It may be stated that the strict English rule is not favored by the American courts, although they apply the doctrine, in cases where it can not be avoided."

It seems to have been refused recognition in this State.

"The testator made certain bequests to each of his children, payable respectively as they became of age. Power is expressly given to the executors to sell real estate for the purpose of raising funds with which to pay these several legacies. Ogden H. Whitman, one of the beneficiaries under the will, became of age in 1852, and was entitled to the bequest in his favor. The sale to John Fisher was made in the spring of 1854. It does not appear but the exact case had arisen where the executors had the clear right under the will to sell real estate independently of the decree of the court. The purchaser was under no obligation to see to the application of the purchase money." *Whitman v. Fisher*, 74 Ill. 147.

But assuming the rule applies to cases of agency it does not arise in cases like the present.

"Where the trusts are defined, yet the money is not merely to be paid over to third persons, *but is to be applied by the trustees to certain purposes which require on their part time, deliberation and discretion*, the purchaser is not bound to see to the due application of the purchase money, as, where for any reason it would be unreasonable and burdensome to require the purchaser to look after the matter and would really amount to constituting him a trustee, he will be free from the control of the general rule." *Story Eq. Jur.*, Sec. 1134; *Perry on Trusts*, Sec. 790, 794.

If the trust is to pay debts generally, the purchaser can not be subject to the rule that he shall see to the application of the purchase money; or if the trust is to pay debts and legacies, or to pay a particular debt and all other debts, or to pay legacies, or to pay debts and apply the balance to the support of some one, there can be no obligation to see to the payment of the debts and legacies. *If one debt is named, but is coupled with others not named, the same considerations apply.* In such trusts the testator must be presumed to have intended that his trustees should have the full power to give receipts for the purchase money in order to apply it to the purposes pointed out. *Perry on Trusts*, Sec. 795.

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To the principle under consideration is referable the well-known rule that a purchaser is not bound to see to the application of his money where the trust is for payment of debts generally; for, to ascertain who are the creditors, and what is the amount of their respective claims, is matter of trust involving long and intricate accounts, and requiring the production of vouchers, which the purchaser would have no right to require. And mere absence of the statement of the purpose for which the money is wanted will not make a purchaser or mortgagee liable on the ground of presumed knowledge that the money was to be applied otherwise than for payment of debts. So if the trust be for payment of a particular debt named and of the testator's other debts. 2 Lewin on Trusts, star page 456.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse a decree of foreclosure entered in a suit brought by the defendant in error to foreclose two certain mortgages.

One of the mortgages for \$10,000 was made by a prior owner of the mortgaged premises, and the other for \$2,000 was made by the plaintiff in error after he became the owner of the same premises; and the indebtedness secured by each matured on the same day. These two mortgages are hereinafter referred to as the Peabody-Houghteling mortgages, and were purchased by the defendant in error on July 21, 1894.

It is not claimed that there could have been any successful defense against either mortgage in the hands of any one except the defendant in error.

The right of defense against a foreclosure of the mortgage, by the defendant in error, is claimed to exist because of a failure by the defendant in error to perform a legal obligation which rested upon it to pay and discharge the same at the time it purchased them.

It is claimed that such legal obligation arose out of certain dealings and attendant circumstances, with reference to

a subsequent mortgage for \$25,000, made by the plaintiff in error to the defendant in error upon the same premises.

Those dealings were substantially as follows:

In the year 1890, and running into 1891, the plaintiff in error incurred expenses aggregating several thousand dollars for repairs and improvements to the building that stood upon and formed a part of the mortgaged premises. Such expenses were rendered necessary to put the building into condition to meet the agreement in such respect that plaintiff in error had entered into with his lessees thereof.

The firm of Bogue & Hoyt (afterward Bogue & Co.) had been for a number of years the renting and financial agents of the plaintiff in error, and undertook to direct the repairs and improvements, and to advance the money therefor, either directly or from moneys which they would procure through discounting the notes of plaintiff in error.

Plaintiff in error does not seem to have been a man of large means, and so far as the control of the property in question was concerned, he appears to have submitted almost wholly to the judgment and management of the Bogues, between one of whom, at least, and himself most affectionate and trustful relations existed.

Apparently, too, the expectation of the plaintiff in error, and perhaps of the Bogues also, at the inception of the repairs, was that their cost could not exceed \$6,000, and could be met by the rents to accrue within the reasonable limits of time for which temporary discounts could be made, or during which the Bogues could carry the necessary advances, but by or before the early spring of 1891 it became known to the plaintiff in error that the repairs, then about half completed, would cost as much as \$19,000.

He testified that he knew it as early as February 13, 1891, and that "about the middle of 1891" Mr. Hamilton B. Bogue told him he would have to make a mortgage. It is quite certain that he meant to say he was told so about the middle of some month early in 1891, for the mortgage that he executed was made early in April, 1891. However that may be, we see that he received the following let-

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ter from Hamilton B. Bogue, which bears the date mentioned by him as being the date before which he knew how largely the repairs had involved him.

“CHICAGO, Feb. 13th, 1891.

Joshua Seavers, Esq.

DEAR FRIEND: At the finish of expenses on the warehouse, including the Peabody-Houghteling loan and advances, there will stand against the property fully \$31,000. I think the largest loan possible to obtain naturally will be \$20,000.

The Aultman lease, you know, runs nine years from next May 1st, paying the first four years \$3,500 per year, and the following five years \$4,500 per year, all in regular monthly payments.

Sincerely yours,

HAMILTON B. BOGUE.”

The “Peabody-Houghteling loan” spoken of in the letter means the two mortgages for \$10,000 and \$2,000, respectively, heretofore specified by us as being the ones to foreclose which this bill was filed, and the difference between them and the mentioned sum of \$31,000 represents the \$19,000 expended and needed to make the repairs.

The Bogues had not rendered to the plaintiff in error any statement of the account as it existed between them at the time that letter was written, and did not inform him how much he owed them at any time before the contemplated mortgage was made, although he knew he owed them a considerable amount. They did, however, have conversations together from time to time, until the mortgage was executed and delivered, with reference to the manner in which the proceeds of the new loan should be applied, and it is plainly established that the agreement by the Bogues was that they would first apply such proceeds to the extinguishment of the two Peabody-Houghteling mortgages, and that thereafter what remained should be kept by them to reimburse them for what plaintiff in error owed them, and for subsequent advances which they should make on account of the building.

George M. Bogue, a member of said firm of Bogue &

Hoyt (succeeded by Bogue & Co., in which he was also a member), was at the time president of the Presbyterian Hospital, the defendant in error, and chairman of its finance committee, and from the time he became such, his said firm acted as the agents of the hospital in the matter of all loans made by it, aggregating over \$100,000.

There was a by-law of the hospital that all of its investments by way of loans upon real estate should be in first mortgages, and should be first submitted to and approved by the board of managers.

There is no evidence of any application for the new loan having been submitted to, or approved by, the manager or the finance committee, and the first that appears to have been known of it by anybody connected with the hospital, except George M. Bogue, is shown by the following letter to its treasurer :

"CHICAGO, March 31, 1891.

George W. Hale, Esq.,

Treasurer Presbyterian Hospital,

153 La Salle street, Chicago.

DEAR SIR: We have negotiated a loan to A. B. & J. S. Seavers for \$25,000, on their property at the corner of 26th and Butterfield streets, the details of which will be given when we hand the papers covering the loan. Please send us your check for the amount of the loan, \$25,000.

Very truly yours,

BOGUE & HOYT."

On the same day of the date of the letter, the treasurer sent to Bogue & Hoyt the following bank check, which was deposited by Bogue & Hoyt to the credit of their account in the Metropolitan National Bank, and paid the next day through the clearing house.

"No. 489.

CHICAGO, March 31, 1891.

Union Trust Company, N. E. Cor. Dearborn and Madison streets:

Pay to the order of Bogue & Hoyt twenty-five thousand dollars.

\$25,000.

PRESBYTERIAN HOSPITAL,
By George W. Hale, Treasurer."

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On the next day Bogue & Co. wrote and sent the following letter to the plaintiff in error:

“CHICAGO, April 1st, 1891.

J. S. Seaverns, 202 S. Water St., Chicago.

DEAR SIR: We are approaching the point where we will soon be able to fix up the new loan on your 26th and Butterfield streets property. Herewith we send you trust deed, to be executed by yourself, and Mrs. Seaverns, together with principal note and interest coupons. These are all made payable to your own order, you will therefore please sign them “Joshua S. Seaverns” and indorse them in blank.

Please sign all these papers and return them to us at your earliest convenience, so that we may have the abstract brought out.

Very truly yours,

Bogue & Co.”

Pursuant to that letter, the plaintiff in error, with his wife, executed the therein referred to trust deed, bearing date March 31, 1891, and his own principal note secured thereby for \$25,000, due five years after date, and appropriate interest notes.

Presumably the papers were delivered to Bogue & Company on the date the trust deed was acknowledged, for on that day Bogue & Co. transmitted the note to the treasurer of the hospital under cover of a letter of that date, as follows:

“APRIL 6, 1891.

Geo. W. Hale, Treas. Presbyterian Hospital, 153 La Salle St., Chicago.

DEAR SIR: Herewith we hand you principal note of Joshua S. Seaverns for \$25,000, together with ten interest coupons for \$750 each, all dated March 31, 1891—the principal note being due on March 31st, 1896. These notes cover your payment to us of \$25,000 on the 31st ult.

The loan is secured by trust deed from J. S. Seaverns and wife to Geo. M. Bogue, on the west 14.24 feet of lot 7 and all of lots 8 and 9 in W. H. Adams' subdivision of part of the east half of the S. E. $\frac{1}{2}$ of Sec. 28, 39, 14, with im-

provements. Insurance policies for \$25,000, properly assigned, with attorney's opinion certifying that good title is vested in J. S. Seaverns, are kept in our vault subject to the directions of the holder of the note. The trust deed has been sent to the recorder's office, and when recorded will be sent you to be filed with the notes.

Very truly yours,

BOGUE & COMPANY."

The Bogues did not, either with the money so furnished to them by the hospital, or in any other way, take up the outstanding Peabody-Houghteling first mortgages, and it was not until after their insolvency became known, nearly three years afterward, that the hospital came to knowledge of the fact that the \$25,000 mortgage was not a first lien upon the mortgaged premises; and neither did the plaintiff in error know whether the mortgage had been sold or not, or how the money had been applied if received by the Bogues. Upon one pretext and another, the Bogues put off any accounting with him concerning the mortgage, and never told him they had negotiated it, although he testified that he supposed they had sold it, but that they repeatedly said it was not "adjusted," and that they would "adjust it pretty soon," whenever he made his request to them for an accounting.

The interest on all the mortgages was paid by the Bogues for the plaintiff in error up to about the time of their failure, which was apparently about March, 1894; and it appears by the testimony of plaintiff in error that he knew that interest was paid by the Bogues for him upon the Peabody-Houghteling mortgages up to as late as March 11, 1894, and approved of their so doing. He did, however, testify that he did not then know that the \$25,000 mortgage had been negotiated, and that in no way was he informed that at the same time when the Bogues were paying the interest on the Peabody-Houghteling mortgages, they were also paying interest on the \$25,000, and that prior to the time of their failure, no statement made by them to him included any item for such interest.

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After the Bogues failed, the hospital discovered that the \$25,000 mortgage held by it was a second lien, and subject to the Peabody-Houghteling mortgages for \$12,000, and on July 21, 1894, it bought those mortgages.

It was, also, not until after the Bogues failed that the plaintiff in error first learned that the hospital held the \$25,000 mortgage; and after the hospital bought the Peabody-Houghteling mortgages, the plaintiff in error refused to pay any more interest on them, his claim being, as we understand it, that the hospital did then only what it should have done long before, by making application to that extent of the proceeds of the \$25,000 mortgage obtained through the Bogues.

Because of the interest not being paid, the Hospital filed this bill to foreclose said two mortgages.

It was concededly the duty of the Bogues, as between themselves and the plaintiff in error, to apply as much of the proceeds of the \$25,000 mortgage as was required for that purpose to pay off and extinguish the Peabody-Houghteling mortgages.

But does their failure to do so, give to the plaintiff in error a right to insist that it was also a duty incumbent upon the hospital?

Counsel for him state their contention in that regard to be, that it "was the duty of the hospital to see to the application of the said money paid for said \$25,000 mortgage to the payment and satisfaction of said two mortgages so sought to be foreclosed, and that the hospital is chargeable with the performance of said duty, and that said two mortgages so sought to be foreclosed, should be declared satisfied by the decree of the court. That the hospital bought said two mortgages so sought to be foreclosed, long subsequent to the negotiation to it of the said \$25,000 mortgage, and that the court should declare the purchase of the said two mortgages, to be a satisfaction and performance of the hospital's duty, and such purchase should be treated as a payment and cancellation thereof."

The answer to the contention hangs mainly upon the

question, partly of law and partly of fact, as to whose agents the Bogues were in that particular matter.

In some respects connected with the transaction the Bogues appear to have acted as the agents of both parties.

So far as the sufficiency of the security and the regularity of the papers were concerned, and to pay over the money to the mortgagor, there appears to be no doubt but they acted as agents of the hospital. But as to the application of the money, by or for the mortgagor, we can see no element of agency on their part for the hospital. That was a matter wholly resting upon the terms of their agency in behalf of plaintiff in error.

Nor are we able to concede that there was a duty, in the sense of a trust, imposed upon the hospital in the matter.

It is true that George M. Bogue was president and chairman of the finance committee of the hospital, upon which committee certain duties were imposed concerning loans of its funds, but his official duty to the hospital to see that its money was loaned only upon first mortgages, did not create a trust relationship by the hospital to whoever might borrow its funds through Bogue.

There was no fiduciary relationship between the plaintiff in error and the hospital. The latter had placed its funds in the hands of the Bogues to loan to the plaintiff in error upon his mortgage. When the mortgage was executed and delivered, the funds in the hands of the Bogues became the funds of the plaintiff in error to be applied as had been agreed upon between them, and their misappropriation after that time by the Bogues was a matter answerable for between themselves.

There can be no question under the evidence but that the Bogues were the agents of the plaintiff in error to receive the money for the mortgage; and it is just as certain that the Bogues were authorized by the hospital to deliver the money to the plaintiff in error upon receipt of the mortgage.

When the exchange of the mortgage for the money was made, the transaction was a completed one, so far as the

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hospital was concerned, and neither by contract or by operation of law was the hospital chargeable with any duty concerning the money after that time.

It never was a matter of trust on the part of the hospital, and the doctrine of the application of trust money or duty has no place in the case, as we view it.

The fact that the hospital had an interest in having the money applied in the first instance to the clearing off of the first mortgage, was not sufficient to constitute it a trustee for that purpose, nor did the fact that George M. Bogue, or the Bogues as a firm, have notice of the purposes to which the money was to be applied, amount to notice to the hospital, and thereby constitute it a trustee to see to such application.

There is no claim that the hospital ever had any notice of the purposes for which the money was borrowed, except such as was obtained through the fact that its president was also a member of the firm that negotiated the mortgage.

Undoubtedly, the general proposition is true, that notice of facts to an agent amounts to constructive notice to his principal of matters connected with the subject-matter of the agency, where the situation is such as that the presumption exists that he will communicate the facts to his principal.

But here no such presumption exists. The loan was in part for the purpose of obtaining money to reimburse the Bogues for the \$19,000 which they had paid in part and contemplated disbursing for the repairs to the building, and they were to receive and hold the money for that purpose, in part. It was neither agreed nor expected that the funds would be paid over by the Bogues to the plaintiff in error. All that was contemplated was, that after taking up the Peabody-Houghteling mortgages, the Bogues themselves should keep the balance to apply on the account between themselves and plaintiff in error.

Under such circumstances, the Bogues' interest was adverse to the interests of the hospital, and the presumption upon which the rule depends fails.

The plaintiff in error knew the fact that the Bogues' interest was opposed to that of the mortgagee, and we do not see how he can invoke the application of the rule of notice, even though it were otherwise applicable. The doctrine with reference to notice in cases of this kind is stated in Higgins v. Lansingh, 154 Ill. 301 (p. 367).

Moreover, the plaintiff in error in no way disputes the entire validity of the \$25,000 mortgage, but on the contrary, expressly acknowledges it to be valid and binding upon him in every respect, and has continued, with full knowledge of all the facts, to pay all interest upon it as it has accrued.

It appears, also, that as between himself and the Bogues, the plaintiff in error has received the benefit of a considerable part, at least, of the \$12,000, which should have been devoted by them to the extinguishment of the mortgages being foreclosed. But we do not consider it necessary, and perhaps it would not be proper, under the state of the case, to enter upon that phase of the case, although it might probably be urged that even though the duty to see to the application of the \$12,000 did devolve upon the hospital, yet the plaintiff in error, having lost nothing, or but a part, because of a failure by the hospital in that regard, could not successfully ask for a cancellation of the mortgages sought to be foreclosed.

To remedy the infirmity of the security to their \$25,000 mortgage, the hospital bought the first mortgages. It is not claimed that there existed any equity against those mortgages in the hands of the original holders thereof from whom the hospital bought them, and no other equity against them is now claimed, except that the hospital should have seen to it that they were extinguished by application to that extent of the \$25,000 mortgage.

We do not question the accuracy of the propositions laid down by counsel for plaintiff in error, nor of the authorities they cite, as applied to appropriate facts, but do differ with them upon the true conclusions to be drawn from the facts of this case.

The decree of the Circuit Court will therefore be affirmed.

Stephen S. Phillips v. Andrew Rehm.

1. **INTEREST—When not to be Allowed.**—To entitle party to recover interest on an open account, delay of payment must be unreasonable and vexatious.

Assumpsit, for goods sold and delivered. Appeal from the Circuit Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed June 1, 1896.

ERNEST SAUNDERS, attorney for appellant.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This was a suit for the price of hardware sold by the appellee to the appellant. On that part of the case there is no dispute. The defense was payment, as to which there is a conflict of evidence.

There is no evidence to justify an allowance of interest, either account stated, or unreasonable and vexatious delay of payment; yet over the objection and exception of the appellant, the appellee was permitted to prove that the interest amounted to \$36.90, and that amount was included in the verdict and judgment, in addition to the original bill. This was error. *Sammis v. Clark*, 13 Ill. 544, has been followed as the law.

The judgment is reversed and the cause remanded.

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N. K. Fairbank Company v. Swift & Company.

1. **TRADE-MARKS.—The Use of, When to be Enjoined.**—A man may not use his own name for the purpose of deception, and such fraudulent use will be enjoined. Fair competition in business is legitimate, and promotes the public good, but an unfair appropriation of another's business by using his name or trade-mark, or an imitation thereof, calcu-

lated to deceive the public, is not permissible and will be enjoined by a court of equity.

2. *SAME—Degree of Resemblance.*—What degree of resemblance is necessary in order to warrant the issuing of an injunction to prevent the fraudulent use of resemblances to trade-marks, or to stop unfair competition in business, must necessarily always continue to be a question which can not be settled by rules applicable to all cases.

3. *SAME—Where a Court Will not Interfere.*—While the court is not bound to interfere where ordinary attention will enable the purchasers to discriminate between the trade-mark used on the goods manufactured by different parties, nevertheless the character of the article, the use to which it is put, and the kind of people who are likely to ask for it, as well as the manner in which it is probable it will be ordered, must not be lost sight of.

4. *INJUNCTION—Unfair Competition.*—All practices between rivals in business which tend to engender unfair competition are odious, and will be suppressed by injunction. No man will be permitted to make use of signs or tokens which serve to confuse the identity of his business with that of another, or to mislead the public, and thus divert custom from his competitor to himself.

5. *SAME—“Cottolene” and “cotosuet.”*—The use of the word “cotosuet” as a trade-mark is not an infringement upon the right to use the word “cottolene.”

Bill for Injunction.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

ROWLAND COX, OLIVER & MECARTNEY, and JOHN S. BROWN, attorneys for appellant.

To determine whether or not a label is fraudulent, the controlling consideration is the effect which its statements have upon the public. The circumstance that the statements may be, in the abstract, untrue is not in itself material. Thus, the continued use by a manufacturer of the name of his predecessor in business after the death of his predecessor as indicating the manufacturer of the goods, has been justified in many cases. *Kidd v. Johnson*, 100 U. S. 618; *Hoxie v. Chaney*, 143 Mass. 592; *Russia Cement Co. v. Le Page*, 147 Mass. 206; *Feder v. Benkert*, 70 Fed. Rep. 613; *Sebastian on Trade-marks* (3d Ed.), 232; *Meriden Britannia Co. v. Parker*, 39 Conn. 450.

Fraud can not be presumed. The question is not what was the technical, legal effect of all the transfers and changes in the business of the various firms and corporations, but what the complainant believed, and had a right to believe, regarding them. If its officers asserted only what they honestly believed to be true, with no intent to mislead the public, there is no fraud. Even though the complainant took too sanguine a view as to its derivative rights, it can not be convicted of fraud if it honestly believed that it possessed them." 67 Fed. Rep. 899.

It was said by the Court of Appeals of New York: "Every trade-mark case is a law unto itself" (138 N. Y. 252). By the Supreme Judicial Court of Massachusetts: "Every case of trade-marks depends very much upon its own circumstances" (122 Mass. 139). By the Supreme Court of Iowa (70 Iowa 481), referring to the cases: "They simply indicate the path which may be followed to advantage." In many other cases it is said that the courts will deal with each particular controversy as it arises, applying the accepted doctrines to the facts as they are made to appear.

Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their enclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression that they are buying those of their rivals. *Coats v. Merrick Thread Co.*, 149 U. S. 566.

The question whether the resemblance between the designs upon the complainants' and the defendants' spools of thread was such as to indicate an unlawful intent was determined by comparison of the two designs. In the case at bar an intention on the part of the defendants to impose upon the public by means of the dress in which they put up their manufacture is found proved. A comparison of the two articles shows that the imposition and injury to the complainants is a natural result of putting upon the market de-

fendants' article, dressed up as they dress it. *Von Mumm v. Frash*, 56 Fed. Rep. 837.

The court must necessarily determine on the evidence and on an examination of the instrumentalities which have been used by the defendant whether their use is inequitable and calculated to produce confusion and mistake. *Munro v. Tousey*, 129 N. Y. 38; *Fischer v. Blank*, 138 N. Y. 244; *T. A. Vulcan v. Meyers*, 139 N. Y. 364; *Von Mumm v. Frash*, 56 Fed. Rep. 830; *Coats v. Merrick Thread Co.*, 149 U. S. 562; *Reddaway v. Bentham Co.*, L. R., 1892, 2 Q. B. R. 640; *Amoskeag Mfg. Co. v. Spear*, 2 Sand. (S. C.) 599.

An injunction ought to be granted whenever the design of a person who imitates a trade-mark, be his design apparent or proved, is to impose his own goods upon the public as those of the owner of the mark, and the imitation is such that the success of the design is a probable or even possible consequence.

This language was used in *Amoskeag Man. Co. v. Spear*, 2 Sand. S. C. 599, a case which has been repeatedly referred to by the Supreme Court of the United States and other courts, 54 Illinois 443, as the leading American adjudication. See 13 Wall. 320; 96 U. S. 255; 128 Ib. 524; 138 Ib. 547; see also *Von Mumm v. Frash*, 56 Fed. Rep. 837, *Co-operative Society v. Co-operative Society*, 8 British Patent, Design and Trade-mark Cases, 429.

It is the liability to deception which the remedy may be invoked to prevent. It is sufficient if injury to the plaintiff's business is threatened or imminent to authorize the court to intervene to prevent its occurrence. *Taendsticks-fabriks, etc., v. Myers*, 139 N. Y. 367.

The fact that careful buyers, who scrutinize trade-marks carefully, are not deceived, does not materially affect the question. It only shows that the injury is less, not that there is no injury. No amount of diligence on the part of the petitioners will guard against this injury. An injunction is their only adequate relief. *Britannia Co. v. Parker*, 39 Conn. 460.

We must not lose sight of the character of the article, the

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use to which it is put, the kind of people who ask for it, and the manner in which it is ordered. Very broad scene-painting will deceive an ignorant, thoughtless or credulous domestic looking for an article in common daily use and of no particular interest to her personally. Morgan's Sons Co. v. Troxell, 23 Hun 632.

If the false is only colorably different from the true; if the resemblance is such as to deceive a purchaser of ordinary caution; or if it is calculated to deceive the careless and unwary, and thus to injure the sale of the goods of the proprietor of the trade mark, the injured party is entitled to relief. Coleman v. Crump, 70 N. Y. 573; see also Singer Co. v. Loog, 8 App. Cas. 18; Read v. Richardson, 45 L. T. R., N. S. 54; Brown v. Mercer, 37 N. Y. Sup. Ct. 235; Lever v. Goodwin, 36 Ch. D. 1; Celluloid Co. v. Cellonite Co., 32 Fed. Rep. 1001.

Cottolene is a proper and valid trade mark. Although it may suggest cotton seed oil, it is not sufficiently descriptive to render it invalid as a trade-mark, under the recent decisions. The rule that names suggestive of the nature or composition of articles may be valid trade-marks if not too accurately descriptive of their character or quality, has been applied in Burnett v. Phalon, 9 Bosw. 192, to the use of the word "Cocoaine;" in Manufacturing Co. v. Ludeling, 22 Fed. 823, to "Maizena," in Leonard v. Lubricator, 38 Fed. 922, to "Valvoline," in Battle v. Finlay, 45 Fed. 796, to "Bromidia;" Keasbey v. Chemical Works, 37 N. E. Rep. 476, N. K. Fairbank Co. v. Central Lard Co. 64 Fed. Rep. 134.

In numerous cases the use of misleading signs has been prohibited. Peterson v. Humphrey, 4 Abb. R. R. 394; Colton v. Thomas, 2 Brews. 308. See also Prince Albert v. Strange, 2 De G. & S. M. 652; Franks v. Weaver, 8 L. T. 510; Thorley's Cattle Food Co. v. Massan, 14 Ch. Div. 763; Williams v. Johnson, 2 Bos. 1; Clark v. Clark, 25 Barb. 76.

Also the use of forms and styles of packages which, in the abstract, were *publici juris*. Sawyer v. Horn, 1 Fed. Rep. 24; Fischer v. Blank, 139 N. Y. 252; McLean v. Fleming, 99 U. S. 252;

And the use of vehicles or omnibuses painted to simulate those used by others. *Knott v. Morgan*, 2 Keen 213; *Marsh v. Billings*, 7 Cush. 322.

And also the use of misleading flags by a real estate auctioneer. *Johnson v. Hitchcock*, N. Y. D. R., Nov. 24, 1888.

In a case relating to unfair competition in business a chancellor has plenary powers, being governed only by his own enlightened intelligence and conscience. He may direct and control every part and incident of the defendant's conduct, and enjoin any and every act which is of doubtful purpose and effect. *Law. Man. Co. v. Tenn. Man. Co.*, 138 U. S. 537; *Thompson v. Montgomery*, 41 Ch. Div. 35; *Orr, Ewing & Co. v. Johnston & Co.*, 7 App. Cas. 219; *Koehler v. Sanders*, 122 N. Y. 74; *Meyer v. Bull Medicine Co.*, 58 Fed. Rep. 884; *Pillsbury v. Pillsbury*, Washburn, etc., 64 Ib. 841.

It was contended that, "*Cotosuet*" is an imitation of "*Cottolene*" and its use should be enjoined.

There are not a few reasons of persuasive force why it should be held that "*Cotosuet*" so closely resembles "*Cottolene*" that there is danger of misconception, mistake and fraudulent substitution.

There is no doubt that the differences between the two words are not such as to compel a conclusion in defendant's favor. On the contrary, the resemblances are not less significant than those which have been held to be sufficient in many instances.

The difference between "*Cottolene*" and "*Cotosuet*" is not such as to justify the defendant's choice.

In *Burnett v. Phalon*, 3 Keys 594, the two words were: *Cocaine* and *Cocoine*. In *Rowley v. Houghton*, 2 Brewst. 303, the two words were: *Hero* and *Heroine*. In *Wamsutta Mills v. Allen*, Cox's Manual 660, the two words were: *Wamsutta* and *Wamyesta*. In *Glencove Mfg. Co. v. Ludeling Mfg. Co.*, 22 Fed. Rep. 823, the two words were: *Maizena* and *Maizharina*. In *Celluloid Co. v. Cellonite Co.*, 32 Fed. Rep. 94, the two words were: *Celluloid* and *Cellonite*. In *Enoch Morgan's Sons Co. v. Edler*, Cox's Manual 713, the two words

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were; **Sapolio** and **Saponite**. In *Estes v. Leslie*, 29 Fed. Rep. 91, the two words were: **Chatter-Box** and **Chatter Book**. In each of the above mentioned instances the use of the simulated word was restrained.

Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. 32 Fed. Rep. 97.

A very recent case involved, **Momaja** and **Mojava**. **American Grocery Co. v. Bennett, Sloan & Co.**, 68 Fed. Rep. 539.

In that case the court said: "In the light of decisions which find infringing resemblances between 'Cottoleo' and 'Cottolene' between 'Cellonite' and 'Celluloid,' between 'Wamyesta' and 'Wamsutta,' between 'Maizharina' and 'Maizena,' between 'Saponite' and 'Sapolio,' (see citations in 64 Fed. Rep. 135), there is little difficulty in disposing of the case."

BOND, ADAMS, PICKARD & JACKSON, attorneys for appellee.

The appellant has no right in the alleged trade-marks, inasmuch as it appears from the record that such marks are at all times used solely upon the product of another person; in other words, that a right in the abstract can not be had in any trade-mark.

The primary object and purpose of a trade-mark is to indicate origin. **Lawrence Mfg. Co. v. Tennessee Mfg. Co.**, 131 U. S. 537, 546; **Columbia Mill Co. v. Alcorn**, 150 U. S. 463; **Canal Co. v. Clark**, 13 Wall. 311; **Manhattan Medicine Co. v. Wood**, 108 U. S. 218.

The primary and the sole object of the trade-mark is to distinguish the goods as being a particular manufacture, or as belonging to a particular party. **Moorman et al. v. Hoge et al.**, 17 Fed. Cases 715, 718.

There is no right in the abstract to a trade-mark; **Browne on Trade-marks**, Sec. 66, Sec. 301, Sec. 676.

A false notice as to the manufacturer or place of manufacture is fatal. **Manhattan Medicine Co. v. Wood**, 108 U. S. 218; **Joseph v. Mockowski**, 96 Cal. 518; **California Fig**

Syrup Co. v. Putnam, 66 Fed. Rep. 750; Prince Mfg. Co. v. Prince's Metallic Paint Co. 135 N. Y. 37; Koehler v. Sanders, 122 N. Y. 76; Columbia Mill Co. v. Alcorn, 150 U. S. 463; Conell v. Reed, 11 Mass. 477; Browne on Trade-marks, Sec 80; Siegert v. Abbott, 61 Md. 276.

That this defense is one that need not be specifically pleaded, but will be enforced by the court to prevent fraud upon the public. See Simmons Med. Co. v. Mansfield Drug Co., 23 S. W. Rep. 169.

The appellee does not infringe either of the alleged trade-marks, even though the same could be held valid. By the confused use of such marks they are uncertain and void.

Trade-marks are addressed to ordinary purchasers or observers—to those who give ordinary attention. Columbia Mill Co. v. Alcorn, 150 U. S. 467; Popham v. Cole, 66 N. Y. 69; Browne on Trade-marks (2d Ed.), Sec. 385, p. 384; Ball v. Siegel, 116 Ill. 137, 146; Coats v. Merrick Thread Co. 149 U. S. 572; Falkenburg v. Lucy, reported in Cox's American Trade-mark Cases, No. 448, p. 461.

In a clear case of actual deception caused by a defendant's mark there is not much need of testimony. In a doubtful case testimony is necessary. Celluloid Co. v. Read, 47 Fed. Rep. 716; Ball v. Siegel, 116 Ill. 146; Legget & Myers Co. v. Finzer, 128 U. S. 184.

As to the consideration to be given Patent Office registrations of two trade-marks, when suit is brought to restrain the use of one of such marks as being an infringement of the other, see Browne on Trade-marks (2d Ed.), 345; Dausman & Drummond Tobacco Co. v. Ruffner et al., 17 Fed. Cases 718.

Competition when conducted fairly and with no intent to deceive gives no ground for complaint. It is to be encouraged rather than condemned. Hazelton Boiler Co. v. Hazelton Tripod Boiler Co., 142 Ill. 509; Coats v. Merrick Thread Co., 149 U. S. 566; Brown Chemical Co. v. Meyer, 139 U. S. 544.

A trade-mark must be clear, well defined, certain. Bo-

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lander v. Peterson, 136 Ill. 215; Candee v. Deere, 54 Ill. 349, 456; Browne on Trade-marks, Sec. 143, p. 162 of 2d Ed., Sec. 89, p. 101.

That a general type or "concept" can not be exclusively appropriated, see Browne on Trade-marks, Sec. 89d.

No one can have more than one trade mark at one time for the same goods. Candee v. Deere, 54 Ill. 456.

The trade-mark "must not be deviated from at the suggestion of whim or caprice." Candee v. Deere, 54 Ill. 456.

The court is not bound to interfere where ordinary attention will enable purchasers to discriminate between the trade-marks used by different parties. Ball v. Siegel, 116 Ill. 137, 146; Coats v. Merrick Thread Co., 149 U. S. 562, 573.

While no law is needed to support the proposition that complainant can not be allowed to take advantage of its own wrong, we cite here some cases relating to advertisements, signs, packages, etc., as such matters are largely relied upon by appellant.

Without testimony, no inference of any fraudulent intent can be drawn from the fact that packages are similar in shape, structure, etc. Ball v. Siegel, 116 Ill. 144; Morgan Sons & Co. v. Troxell, 89 N. Y. 292.

The object of using a barrel, box, or other package, is to contain, carry, protect and preserve the goods, or for their convenient handling; and form of some kind and dimensions, are essential in a box, barrel or package, without which it can have no existence. But the size or shape of the barrel, box or package can scarcely be considered a mark, nor can that be the sense in which the terms "form" or "device" are used when employed as a definition of a mark, used for purposes of trade. So general is the idea that the symbol, figure, letter, form or device, used for a trade-mark, must be a mark, impressed, cut, engraved, stamped, cast upon, or in some way wrapped around, or appended to, the article, or the package, as something independent of the article itself, or the package used to contain it, that it is

carried into the statutes of some States, where it is, doubtless only intended to adopt the common law definition. *Moorman v. Hoge*, 17 Fed. Cas. 718.

That the word "Cottolene" can not be appropriated as a trade-mark, for the reason that it is the proper name of the goods.

Generic or descriptive words can not be appropriated as trade-marks any more than common or true names. *Canal Co. v. Clark*, 13 Wall. 311, 323; *Burton v. Stratton*, 12 Fed. Rep. 700; *Wilcox & Gibbs Co. v. Gibbens F. Co.*, 17 Fed. Rep. 623; *Colgan v. Danheiser*, 35 Fed. Rep. 150; *Rumford Chem. Works v. Muth*, 35 Fed. Rep. 524; *Clotworthy v. Schepp*, 42 Fed. Rep. 62; *Brown Chem. Works v. Stearns Co.*, 37 Fed. Rep. 360.

A court takes notice, as a matter of law, of the meaning of words. *Royal Baking Powder Co. v. Raymond*, 70 Fed. Rep. 382.

"In a clear case of intentional or actual deception, there is not much need of testimony as to the possibility that purchasers would be misled. In a doubtful case testimony is valuable." *Celluloid Co. v. Reed*, 47 Fed. Rep. 712, 716. See also note 1, p. 434, of *Rowland Cox's Manual of Trade-mark Cases*, second edition.

The law is well settled that no circular, price-list or advertisement, no matter how frequently repeated, can constitute a trade-mark, and it is only in that way appellees have used, and appellants also using it as a generic term, which they had a clear right to do. *Candee, Swan & Co. v. Deere & Co.*, 54 Ill. 439, 462.

It is well settled, moreover, that directions, advertisement notices, etc., constitute no part of a trade-mark. *Ball et al. v. Siegel et al.*, 116 Ill. 143.

Property in a trade-mark, or rather in the use of a trade-mark or name, has very little analogy to that which exists in copyrights, or in patents for inventions. The office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed, or, in other words, to give notice who was the producer. *Manhattan Medicine*

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Co. v. Wood, 108 U. S. 218; Canal Co. v. Clark, 13 Wall. 311; Joseph v. Mackowski, 96 Calif. 518.

“A person who comes into a court of equity for an injunction in a case of this kind must come with clean hands; he can not be granted relief upon a claim to the exclusive use of a trade-mark which contains a false representation calculated to deceive the public as to the manufacturer of the article and the place where it is manufactured.”

A number of cases, including the Manhattan Medicine Company case, are cited in the above case as supporting the doctrine laid down. See also California Fig Syrup Co. v. Putnam, 66 Fed. Rep. 750; Prince Mfg. Co. v. Prince's Metallic Paint Co., 135 N. Y. Rep. 37; Koehler v. Sanders, 122 N. Y. 76.

In Siegert v. Abbott, 61 Maryland 276, the court said: “It is a general rule of law, in cases of this kind, that courts of equity will not interfere by injunction when there is any lack of truth in the plaintiff's case; that is, when there is any misrepresentation on his trade-mark or label. Browne on Trade-marks, Sec. 71 and Sec. 74 *et seq.*”

In the recent case of Columbia Mill Co. v. Alcorn, 150 U. S., the court, p. 463, after citing numerous cases, says: “These cases establish the following general propositions: (1) That to acquire the right to the exclusive use of a name, device or symbol, as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trade-mark must point distinctively, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed, as its primary object and purpose, to indicate the owner or purchaser of the commodity, and to distinguish it from like articles manufactured by others. (2) That if the device, mark, or symbol was adopted or placed upon the article for the purpose of identifying its class, grade, style or quality, or for any purpose other than a reference to or indication of its ownership, it can not be sustained as a valid trade-mark.”

The rule has also been stated as follows: "Where no actual or constructive fraud is shown and no intention to harmfully mislead purchasers manifested by the use of instrumentalities that would naturally tend to that result, the rule does not apply, but a false representation as to the place of origin of the article is fatal." Browne on Trade-marks, Sec. 71, p. 80; Manhattan Medicine Co. v. Wood, 108 U. S. 218; Conell v. Reed, 11 Mass. 477, and cases cited.

That an abstract right to a trade-mark can not exist is well settled. Browne on Trade-marks, Sec. 676, expresses this idea as follows:

"We have seen heretofore that there can not be property in an abstract symbol, whether that be an original design, or word, or emblem; for it is only an index to a certain article of merchandise. A trade-mark ceases to be property the moment that its exclusive use ceases, and it resumes its ideal state. Its conjunction with a corporeal thing is like the union of soul and body."

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from the decree dismissing a bill filed by the N. K. Fairbank Company, a corporation organized under the laws of the State of Illinois, against Swift & Company, also a corporation organized under the laws of this State. The suit was brought to restrain an alleged infringement of two trade-marks, which are the property of appellant, and also to protect the appellant against an alleged unfair competition in business.

It appears from the evidence that the contending parties each manufacture very similar substances; that the appellant was the first to make practicable for common use in cooking, a preparation made from cotton seed oil, for which preparation it coined the name "cottolene," and that to popularize the use of the same, and to make the public acquainted therewith, it has for a number of years expended in advertising very large sums of money—as one witness testified, as much as \$100,000 per annum; that the manu-

facture carried on by the defendant of cotton seed oil for cooking purposes, was by it begun some time after the complainant had engaged in such business, and after complainant had obtained its trade-marks and introduced its manufacture to the public under the name of "cottolene;" that the defendant coined and has made use of the word "cotosuet" to designate its product; that the principal ingredient of each of the preparations is cotton seed oil, a small quantity of beef suet stearine being added thereto.

The complainant charged that the defendant, "for the purpose of creating upon the trade and public the false impression that said defendant's product is in reality the product of complainant, or that the defendant's product is the same as that of the complainant and does not differ therefrom as the complex product of one manufacturer commonly differs from a similar product of the same general class made by another manufacturer and for the purpose of deceiving or enabling dealers to deceive and impose upon persons, and especially the careless and uninformed and those ignorant of the English language who were accustomed or disposed to buy for trade or consumption the cottolene made by the complainant, by passing off and imposing upon such persons the product of defendant in lieu of that of complainant, and for the purpose of trespassing upon the good will of the public towards complainant, and unlawfully and wrongfully securing to defendant trade which of right belongs to complainant, defendant has made and is now using upon its said goods false and fraudulent marks, signs and tokens," setting forth a particular description of such alleged false and fraudulent marks, signs and tokens, among which is that the word "cotosuet" is so used by the defendant.

No person is entitled to represent his wares as being the goods of another man, or articles of his manufacture as having been made by another, and no person is by the law permitted to use any mark, sign, symbol, name, device or other means, whereby he makes a false representation, or deceives as to his own goods, or as to the goods of another,

or whereby, without himself making a false representation to a buyer who purchases from him, he enables such buyer to tell a lie or to make an untrue representation to somebody else who is the ultimate customer. Nor is it a defense to an action, the gist of which is a charge of deception, to reply that the words uttered by the defendant were the literal truth, for the truth may be stated in a way likely to, and that does, deceive. What is required is that a party shall not conduct his business so that by what he says or does, he deceives customers to their injury, or to that of a competitor.

A man may not use his own name for the purpose of deception, and such fraudulent use will be enjoined. Fair competition in business is legitimate and promotes the public good, but an unfair appropriation of another's business by using his name or trade-mark, or an imitation thereof calculated to deceive the public, is not permissible and will be enjoined by a court of equity. *Hazleton Boiler Co. v. Hazleton Tripod Boiler Co.*, 40 Ill. App. 430; *Same*, 142 Ill. p. 509; *Reddaway v. Banhan*, House of Lords, opinion filed March 26, 1896; *Celluloid Co. v. Cellonite Co.*, 32 Fed. Rep. 97.

As has frequently been said, it is not often the case that one intending to palm off his goods as those of another, copies entirely the marks, signs, brands or trade-marks of his rival; what he does is to imitate, more or less closely, in such a way as to deceive the unwary or ordinary observer.

What degree of resemblance is necessary in order to warrant the issuing of an injunction to prevent the fraudulent use of trade-marks, or to prevent the fraudulent use of resemblances to trade-marks, or to stop unfair competition in business, must necessarily always continue to be a question which can not be settled by rules applicable to all cases.

While the court is not bound to interfere where ordinary attention will enable the purchasers to discriminate between the trade-marks used on the goods manufactured by different parties, nevertheless, the character of the article, the use to which it is put, and the kind of people who are likely

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to ask for it, as well as the manner in which it is probable it will be ordered, must not be lost sight of. *Popham v. Cole*, 66 N. Y. 69; 23 Am. Rep. 22, and cases there cited; *Morgan's Sons Co. v. Troxell*, 89 N. Y. 292; 42 Am. Rep. 294; *Manufacturing Co. v. Francis*, 101 U. S. 51; *Ball v. Siegel*, 116 Ill. 137; *Reed v. Richardson*, 45 L. T. (N. S.) 54; *Beard v. Turner*, 13 Id. 736; *Leidesdorf v. Flint*, 7 N. W. Rep. 174; *Eggers v. Heink*, 63 Cal. 445; *Morgan's Sons Co. v. Troxell*, 23 Hun 632; *Ewing v. Johnston*, L. R. 18, Ch. Div. 612; *Apollonaris Co. v. Sherer*, 22 Fed. Rep. 22.

Applying these principles to the case at bar, we are, from an examination of the evidence, to determine whether defendant has conducted itself so that its goods are represented or made to appear as the goods of the complainant, and whether the defendant, without making a direct false representation to any of its customers, has so conducted itself as to enable such customers to make a false representation to somebody else who is to be the ultimate customer. Has it been guilty of unfair competition in business?

All practices between rivals in business which tend to engender unfair competition, are odious, and will be suppressed by injunction. No man will be permitted to make use of signs or tokens which serve to confuse the identity of his business with that of another, or to mislead the public, and thus divert custom from his competitor to himself.

It is urged that the defendant, knowing the great success which had attended the endeavor to sell the complainant's product under the name "cottolene," deliberately chose as a designation for its, the defendant's, product, the word "cotosuet," intending thereby to confuse the public as to the identity of the product of the complainant and that of the defendant, and that the use of the word "cotosuet" has had such effect.

We do not agree with what has been said in one case, that the use of a sign or token so similar to that of a rival as that there is a possibility that confusion may arise therefrom, is sufficient to call for the interposition of a court of equity. Confusion is possible under almost any circumstances. The

question is not what is possible, but what is probable. The word "cottolene," from its similarity of formation to the words gasolene, naphthalene, benzolene, petrolene, and other chemical names, indicates an article derived substantially entirely from a product of the cotton plant; while the word "cotosuet" indicates a substance derived from a product of the cotton plant and suet; and we do not think that an ordinary purchaser of such articles would be misled by the term "cotosuet" into purchasing it, thinking he was obtaining what is known as "cottolene." We can well understand that a person who desired to obtain, for cooking purposes, a vegetable shortening, might easily be induced by a grocer to accept "cotosuet," "cookene," "golden suet," "suetene," "cornene" "clarelene," "golden shortening," or "supreme shortening"—names applied by other manufacturers to their respective products of articles similar to "cottolene"—although such purchaser had distinctly asked for "cottolene." It is well known that retail vendors can, to the ordinary purchaser, sell several similar articles, that which they, as such vendors, endeavor to dispose of, and that if the articles are substantially alike, the seller will hear no "kicking," as, in the present case, one witness testified he heard none when he gave "cotosuet" to people who inquired for "cottolene." There are doubtless in this country millions of people to whom, if Seipp's beer were given when they called for Blatz's, or *vice versa*, would make no complaint.

To a person of ordinary observation and attention, the distinction between "cottolene" and "cotosuet" is obvious. Only a person of more than average heedlessness and carelessness would mistake one for the other.

We have examined a large number of exhibits in the way of pictures, signs and devices, employed respectively by appellant and appellee to advertise and sell their respective goods, and do not find, except in one instance, any such resemblance as would deceive a person of ordinary attention—having reference in what we say to the class of persons by whom these respective products are likely to be inquired

N. K. Fairbank Co. v. Swift & Co.

for and bought, and the way and manner in which they are sold — nor do we find any evidence that the defendant has intended to palm off its goods as the product of the complainant; on the contrary, we think in every instance, the brands, marks and advertisements of "cotosuet" contain a plain and easily recognizable statement; indeed, one by which it is substantially impossible for an observer to fail to see that the "cotosuet" advertised or branded is made only by Swift & Company, the defendant.

One of the trade-marks of the complainant is that of the head of a steer surrounded by cotton bolls. The defendant has made use of the head of a steer surrounded by cotton bolls. The steers do not look alike; the dissimilarity between the two heads is very apparent; yet as the picture of the steer's head, made by the complainant, has surrounding it the words "Cottolene, the new shortening, made by The N. K. Fairbank Company, Chicago, U. S. A.," and the representation of a steer's head used by the defendant has about it the words, "Cotosuet, the new shortening, made only by Swift & Company, Chicago, U. S. A.," we are of the opinion that there is such similarity between these two devices, cards or advertisements, as that there is a tendency to deceive, and while in the very great amount of advertising matter put forth by the respective parties, it is not strange that as to more or less of the same there should be, without any intention to deceive, considerable similarity in the devices used by one to those employed by the other, we think, without reference to whether the device of the steer's head surrounded by cotton bolls used by the defendant was without the intention to make something similar to that of the complainant, made use of, yet it is a thing it ought not to do; and this, we understand, the defendant concedes, and insists that it has altogether ceased to use such device; and there being no evidence to the contrary of this statement, we do not think that it is necessary an injunction should go as to the use of such device by the defendant.

As to the use of the word "cotosuet," and devices other

than the steer's head, before mentioned, employed by the defendant, of which complaint is made, we do not put our affirmance of the decree of the Circuit Court upon the ground that careful buyers will not be deceived, but that persons of ordinary attention, such as will be likely to ask for and desire to buy complainant's product, will not be deceived. The complainant asks that an answer may be made to this question: "Why did the defendant coin and use the simulated word 'cotosuet?'" The officers and agents of the defendant have testified how they came to make use of that word, and there is nothing to show that what they said in this regard is not true. No court, rolling back the record of time, can open, read and know the real intent and purpose and the actual motive governing the action of the defendant in coining the word "cotosuet" as a name for its product. Under the testimony and the circumstances of this case, it seems to us it made use of such word because, as clearly as any short word that could be created, it briefly designated the materials from which the defendant's product is made, and that it was not chosen for the purpose of misleading the public or defrauding the complainant out of anything to which it was entitled. We do not find that the defendant has made use of its carts and wagons of complainant's registered and well known trade mark or devices similar thereto, to such an extent or in such a manner as to cast suspicion upon its purposes, or show that it intended to perpetrate a fraud either upon the public or the complainant; and it seems to us that in printing on its boxes, cards, factory, posters, and elsewhere, the sentence, "Cotosuet, the new shortening, made only by Swift & Co." it meant to proclaim to the world that "cotosuet" was a new shortening made only by it, the defendant. The complainant admits that more than a dozen manufacturers are making in large quantities, as does it, a new shortening, the principal ingredient of which is cotton seed oil. Notwithstanding this, the complainant continues to publish as an advertisement the lines, "Cottolene, the new shortening, made by the N. K. Fairbank Co." We do not understand that by this the complainant means to declare that it is the only

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manufacturer of a new shortening, or that the words "the new shortening," can only truthfully be applied to its product, but that by such advertisement it proclaims that "cottolene" is the new shortening by it made. The complainant does not claim that the words, "the new shortening," are its trade-mark, or that it has acquired any right to the exclusive use of the same; its insistence merely is, that those words having been used by it in connection with its advertisement of "cottolene," those words used by the defendant in connection with its advertisement of "cotosuet" tend to deceive the unwary. So it may be said, do the words "Chicago, U. S. A." employed by both complainant and defendant, have a tendency to confuse. Doubtless, there would be less danger of confusion if complainant's product was made only in Chicago, and the defendant's in St. Louis, and the advertisements of the respective parties respectively so stated. But as we have before stated, we are not concerned in this case with possible confusion, or with mistakes that may be made by persons of more than average carelessness and heedlessness, but with confusion likely to arise in the mind of the ordinary observer of the class and condition of those whom it is probable will desire to purchase "cottolene," under the circumstances and in the manner in which it is offered for sale. As to such circumstances and such manner, we do not think the complainant is being, or will be, unduly prejudiced by anything the defendant is doing. The court below, therefore, in our judgment, properly refused to enjoin the defendant, as prayed by the complainant, and its decree is affirmed.

Sali Schwartz et al. v. W. D. Messinger.

64	495
67	141
64	495
167 ^s	474

1. CONTRACTS—*Interpretation of.*—A written contract must be so interpreted as, if possible, to carry out the intention of the parties.

2. VOLUNTARY ASSIGNMENTS—*Subject to Existing Equities.*—An assignee under the law relating to assignments for the benefit of creditors, takes the property of the assignor subject to equities existing at the time of the assignment.

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Assignment for the Benefit of Creditors.—Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

E. A. ROSENTHAL, MOSES SALOMON, HENRY F. JOSLIN and SIMEON E. BAUM, attorneys for appellants.

D. M. MARTINDALE, attorney for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellants are creditors of Leon Hornstein, who was a printer, and made an assignment for the benefit of his creditors, and the assets are now being administered under the direction of the County Court.

Before his assignment he had a contract to furnish to B. F. Norris & Allister a catalogue for the price of \$3,800. He owed the appellee about \$800, and besides bought from the appellee paper to the value of \$1,205.52 to use in making the catalogue. Hornstein's business name was "Hornstein Bros." Before the catalogue was finished Hornstein gave to the appellee a paper as follows:

"For value received, we hereby sell, assign and transfer all of our right, title, and interest in and to the stock intended for the B. F. Norris & Allister Company catalogue to W. D. Messinger, the same being 305 reams 36x48 S. & S. C. Tint Book, valued at \$1,200, and also we hereby sell, assign, and set over out of the work already done on said catalogue, and of the account against said B. F. Norris & Allister Company, the sum of eight hundred dollars (\$800), to W. D. Messinger. It being the intention to secure to said W. D. Messinger the sum of two thousand dollars (\$2,000) out of said job. All of which is for value received.

HORNSTEIN BROS.
LEON HORNSTEIN.

Chicago, Sept. 12, 1895."

If that paper has any legal or equitable operation, the appellants say that it was an unlawful preference of the ap-

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peltee, and not valid under the familiar doctrine of *Preston v. Spaulding*, 120 Ill. 208.

That question was determined by the County Court in favor of the appellee, upon a consideration of a good deal of evidence, and without reviewing that evidence we concur in that determination.

Although the paper purports to be a sale of the paper mentioned in it, yet it is clear that it was not intended so to operate. On the contrary, it was intended that the property in the paper, worked up into catalogues, should pass to Norris & Allister.

But “a written contract shall be so interpreted as, if possible, to carry out what the parties meant.” Bishop *Cont.*, Sec. 380.

The paper expresses the intention in unambiguous words, and the mode adopted by assigning the “stock” and part of the “account” was sufficient between the parties themselves to constitute an equitable assignment of \$2,000 of the money which might accrue from Norris & Allister to Hornstein “out of said job.” Bispham *Prin. Eq.*, Sec. 167; 1 *Am. & Eng. Ency. of Law*, 835. And see the principles by which intention is to be carried into effect very fully stated in *Peckham v. Hadduck*, 36 Ill. 38.

Now the assignee took the property of Hornstein “subject to all the equities that existed in respect thereof in the hands of” Hornstein. *Davis v. Chicago Dock Co.*, 129 Ill. 180.

Whatever was operative as an assignment against Hornstein, was so against the assignee.

The record shows that from Norris & Allister, upon the contract for the catalogue, \$1,399.50 came to the hands of the assignee, and the appellee has been paid nothing.

The court directed the assignee to pay the money to the appellee, and from that order this appeal is prosecuted. The order was right, and it is affirmed.

What is said in the brief of the appellants about claims for labor is based upon no error assigned, nor upon any showing that any of these appellants had any interest in any such claims. Affirmed.

64 498
68 448
69 124
64 498
1948 *841

Joseph Epstein v. Mary Berkowsky.

1. **MALICIOUS PROSECUTION—*Malice and Probable Cause.***—In action for malicious prosecution, the party bringing the action is required to show a combination of malice and want of probable cause on the part of the prosecutor. If malice and a want of probable cause do not coexist, the action must fail.

2. **SAME—*Malice Inferred From a Want of Probable Cause.***—Malice may be inferred from a want of probable cause, but want of probable cause can not be inferred from malice.

3. **SAME—*Burden of Proof.***—In actions for malicious prosecution, the burden is on the plaintiff to show affirmatively, by circumstances, or otherwise, amounting to the clear preponderance of the evidence, that the defendant had no reasonable cause for the prosecution.

4. **MALICE—*May be Inferred From the Circumstances.***—In actions for malicious prosecution, the fact that the defendant procured the arrest of the plaintiff on three separate warrants sworn out by him upon distinct charges growing out of the same transaction, is competent as tending to show that the defendant was actuated by malicious motives.

5. **ADVICE OF COUNSEL—*Must be Disinterested.***—A defendant in an action for malicious prosecution, being himself a lawyer and acting as his own adviser in the matter, can not shelter himself behind his own advice as counsel.

6. **WITNESSES—*Competency of Infants.***—The admissibility of children under fourteen years of age to testify, is largely discretionary, and depends mainly upon the moral sense, intelligence and understanding of the child.

Trespass on the Case, for malicious prosecution. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the March term, 1896. **Affirmed.** Opinion filed June 1, 1896.

J. F. KOHOUT, attorney for appellant.

WICKERSHAM & HAYNER, attorneys for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action on the case brought by appellee against the appellant for malicious prosecution, and resulted on the trial in the Circuit Court in a verdict against appellant for

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\$1,770, from which appellee remitted \$1,270, and a judgment for \$500 was rendered.

The appellant is a member of the bar, and has practiced law for upward of eighteen years. The appellee kept a house on Michigan avenue, Chicago, in which she rented rooms. Among her tenants was a client of the appellant whom appellant called to see on a matter of business. Being informed at the door that the client was not in the house, the appellant, in order to see if a note had been left for him, went up stairs to his client's room. Returning down stairs after a few minutes, he was met by the appellee, and an altercation arose between them, they then being strangers to one another, concerning his right to go to the apartments of her roomers in their absence.

The testimony of each is directly contrary to that of the other, as to what each said and did to the other. According to each, the other was guilty of using opprobrious epithets, and of making threats, and assaults.

Whatever the exact truth in that regard may be, the appellant later in the same day did the most injudicious thing, for a lawyer, of swearing out three warrants for the arrest of appellee upon three several charges of assault and battery, making threats, and making a disturbance in violation of a provision of the municipal code of Chicago, and of accompanying the officers having the warrants to arrest the appellee and pointing her out to them.

The appellee was taken by the officers quite a long distance, part of the way on foot and part of the way in a police patrol wagon, to the Maxwell street police station, and was there confined in the basement for two or three hours, until she could procure bail.

Three days later, the causes were called and continued to another day, when, upon a hearing of all the evidence, the police justice ordered the appellee to be discharged in each case.

The lack of proof, want of probable cause, the excessiveness of the damages recovered, and the admission of incompetent evidence, are the principal grounds urged for a re-

versal of the judgment. No instructions were asked on either side, except one by the appellant to find the issues for the defendant, which was refused.

It is the law that in all actions for malicious prosecution the party bringing the action is required to show a combination of malice and want of probable cause on the part of the prosecutor. In other words, if malice and a want of probable cause do not coexist, the action must fail.

And although malice may be inferred from the want of probable cause, a want of probable cause can not be inferred from malice.

The burden is on the plaintiff to show affirmatively, by circumstances, or otherwise, amounting to a clear preponderance of the evidence, that the defendant had no reasonable ground for the prosecution. 2 Greenleaf's Evid., Secs. 453, 454, 455; Israel v. Brooks, 23 Ill. 575; Palmer v. Richardson, 70 Ill. 544; Calef v. Thomas, 81 Ill. 478; Skala v. Russ, 60 Ill. App. 479.

The evidence, it is true, was of a conflicting character as to what the actual occurrences were between the appellant and the appellee, but they were all made to appear to the jury, and from a careful reading of it all, we think the conclusion of the jury may fairly be said to have been based upon a decided preponderance in favor of the appellee. And that the prosecution was malicious, aside from the inference that it was so because of the lack of probable cause, is made apparent from the proof of utterances made by the appellant to the appellee, not only before but after the arrest, that he would make her "sick and tired;" that he would "fix her;" expressions that he does not deny using to her.

It may be said also, that causing the arrest of appellee on three separate warrants, sworn out by appellant, upon distinct charges growing out of the same transaction, tends to show that appellant was actuated by harassing and malicious motives. The jury doubtless believed from the evidence that the appellant acted maliciously or they would not have returned a verdict for a sum so much in excess of all actual damage sustained.

Appellant was a lawyer of many years experience, and,

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being his own adviser, can not shelter himself behind the advice of counsel, nor a lack of knowledge that he must be chargeable with, that the prosecution was without reasonable cause.

It is argued that the want of a probable cause was not shown by the appellee when making out her original case. But we can not agree to that contention. If made out at all it was done in the presentation of appellee's original case.

Regularly, want of probable cause should be shown in the plaintiff's case in chief, yet it must not be understood that if such want were shown upon all the evidence, the order of proof would make the verdict wrong. *Skala v. Russ*, *supra*.

It is further urged that permitting Eva Berkowsky, a girl ten years old, to testify, was error. The witness upon her *voir dire* examination said she was never in court before and did not know what it was to be sworn, nor what would happen to her if she did not tell the truth, nor if it would make a difference if she told a lie.

But she said she was there to tell the truth, that she preferred to tell the truth, and that it was wrong to tell a falsehood, and she appears to have testified in a very intelligent manner.

The admissibility of children under fourteen years of age to testify, is largely discretionary, and depends mainly upon the moral sense, intelligence and understanding of the child. 1 *Greanleaf's Evid.*, Sec. 367.

From an inspection of the testimony given by this witness, we regard the discretion which admitted her to testify, to have been wisely and properly exercised.

The judgment that was entered after the *remititur* was made seems to us to be large, but under all the circumstances of the case it is probably as small, if not smaller, than would be the verdict of another jury; and the judgment of the trial court, who saw and heard all the witnesses, having been freely and most commendably exercised in requiring the *remititur* that was made, we can not say it should certainly be for less. The judgment of the Circuit Court is therefore affirmed.

William R. Hartley v. George J. Atkins, George E. Milligan, Ophir Mining Company and American Development Company.

1. **CREDITOR'S BILL—*Requisites of the Sheriff's Return.***—An officer's return to an execution by order of the plaintiff's attorneys is not a sufficient return upon which to base a creditor's bill.

Creditor's Bill.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANECKY, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

ALFRED P. WILLIAMS and **C. M. FAILING**, attorneys for appellant.

CHARLES F. MORSE, attorney for appellees.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant filed a judgment creditor's bill based upon the return of an execution, which return is as follows:

“The within named defendant and no property of the within named defendant found in my county upon which to levy this writ. I therefore return the same, no property found and no part satisfied, this 25th day of March, A. D. 1895, by order of plaintiff's attorney.

JAMES PEASE, Sheriff.

by **J. A. McCARTNEY**, Deputy.”

The opinion of Judge Shepard in *Pecos Irrigation Co. v. Olson*, 63 Ill. App. 313, leaves nothing for me to say in this case, except that the decree dismissing the bill is affirmed.

Henry Brand v. Victor Thompson.

1. **VERDICTS—*Not Manifestly Against the Weight of Evidence.***—A verdict not manifestly against the weight of the evidence will not be disturbed.

Chicago Training School v. Davies.

Assumpsit, for commissions. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

REMY & MANN, attorneys for appellant.

CLARK & CLARK, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action begun before a justice of the peace to recover commissions on certain barrels of flour made by appellee for appellant.

Only a question of fact is involved. There is no such preponderance of evidence for the appellant as will warrant a reversal of the judgment, and it is affirmed.

Chicago Training School, etc., v. Isaac Davies.

64 503
88 54

1. DAMAGES—*Manner of Estimating—Work Done Under a Contract.*—When a party seeks to recover for work done or materials furnished under a special contract, the contract must govern as to the value of the work and materials supplied. The contractor can not recover upon a *quantum meruit* or *quantum valebat*, disregarding the prices fixed by the contract, although he may, by the wrongful act of the other party to the contract, have been prevented from completing the same.

Assumpsit, work, labor, etc.—Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed June 1, 1896.

JONES & STRONG, attorney for appellant.

WILLIAM H. SISSON, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellee having contracted with appellant to do the car-

penter work upon a building it was erecting, began the performance of his contract. Much fault was found with appellee by the superintending architect, he claiming that appellee did not keep a sufficient force at work, and was behind in his performance, thus delaying other contractors.

After much complaint to appellee, appellant, as the contract provided it might, if an insufficient number of workmen were by appellee supplied, took the matter into its own hands, and itself provided workmen and completed the carpenter work.

Appellee contended, and offered evidence to show, that he was not derelict, and that the action of appellant was unjustifiable.

Assuming, as we may, that by the verdict the controversy as to whether appellant was justified in itself employing men and setting them to completing the work appellee had agreed to do, was decided against appellant, nevertheless we must reverse this judgment, because the jury were incorrectly instructed as to the manner of estimating the compensation to be given to appellee for what he did do.

At the instance of appellee the following instruction was given:

“1. If the jury believe from the evidence that the defendant willfully and wrongfully violated the contract between it and the plaintiff and prevented plaintiff from finishing his contract, and that plaintiff has suffered loss and damage by reason of said acts of the defendant, then the jury should find the issues for the plaintiff and assess his damages at such sum as they find from the evidence was the reasonable value of the work, labor and material furnished by the plaintiff to and for the building in question.”

In this State when a party seeks to recover for work done or materials furnished under a special contract, the contract must govern as to the value of the work and materials supplied. The contractor can not, in such case, recover upon a *quantum meruit* or *quantum valebat*, disregarding the prices fixed by the contract, although he may, by the wrongful act of the other party to the contract, have been prevented

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from completing the same. *City of Chicago v. Sexton*, 115 Ill. 230; *Clark v. Scanlan*, 33 Ill. App. 48; see also *Watrous v. Davies*, 35 Ill. App. 542.

As the case must be remanded for another trial, we refrain from any comment upon the evidence. Reversed and remanded.

Howard Greer v. Morris Sellers et al.

64	505
172 ^a	549
64	505
80	475

1. CORPORATIONS—*Contracts Between Stockholders*.—A proposition by a part of the stockholders of a corporation as to the sale by them of the property of the corporation to the other stockholders and accepted by them, constitutes a valid contract.

2. SPECIFIC PERFORMANCE—*Contracts Relating to Personal Property*.—A contract between the stockholders of a corporation relating to the sale of the personal property of such corporation, embracing letters patent, which gave to such property substantially all the value it possesses, will be enforced in equity by a decree for specific performance.

3. DAMAGES—*When Recoverable in Equity*.—A contract which may be specifically enforced, if by reason of events occurring subsequent to the filing of the bill, a specific performance can not be decreed, equity, having jurisdiction, will proceed and award such damages for non-performance as might under other circumstances be recoverable at law.

4. ESTOPPEL—*Where it Does Not Apply*.—Where two persons owned all of the stock of a corporation, the property of which was made valuable by certain patent rights, also belonging to the corporation, and one of them being the president, under an agreement assigned the patents to the other, *it was held* there could be no one but the other to complain, and he would be estopped from complaining by having contracted to accept them.

5. RATIFICATION—*By Corporation*.—Ratification is as susceptible of being made by a corporation as by an individual, and it is not always necessary that either the board of directors, as such, or that the stockholders specially convened, should expressly act upon the subject-matter needing ratification.

6. SAME—*By Acquiescence*.—There may be ratification by acquiescence and general conduct, under a knowledge of all the facts, as well as by express action. Corporations, like individuals, may be bound by a ratification evidenced by its acts, and such ratification need not be in writing even though it be a ratification of an act done without authority.

Bill for Specific Performance.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded, with directions. Opinion filed June 1, 1896.

JONES & STRONG, attorneys for appellant.

LOESCH BROTHERS & HOWELL, attorneys for appellees.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The Superior Court dismissed for want of equity a bill filed by appellant against the appellees to enforce specific performance of an alleged contract, and this appeal is from such decree. The cause was heard upon the pleadings, and proofs taken before the court.

The contract in question was as follows:

"Outline of proposition between Howard Greer and Morris Sellers:

Greer to take all of the Greer patents, and all of the special machinery attached to punching machine; all other appliances belonging to the making of spikes; he surrendering all of his stock in M. S. & Co. and to furnish M. S. & Co. complete set of templates for splices; M. S. & Co. to loan machine No. 4 for six months and pay Howard Greer \$1,800 towards a new machine for cutting spikes; Howard Greer to fill all of the present orders so far as the material now on hand will complete. This agreement to be put in proper form at as early a date as possible, pending the return of the company's attorney to draw up the necessary releases, etc.

MORRIS SELLERS.

Tuesday, Sept. 4, 1894."

The said proposition was delivered on or about the day of its date by the signer, Morris Sellers, one of the appellees, to the appellant, who is the same person mentioned therein as "Greer," and it was alleged and proved that wherever in said writing "M. S. & Co." occurred the corporation of Morris Sellers & Co. was meant.

It seems that the appellant and the appellee, Morris Sellers, were associated together either as partners, or as sharers in the profits of a business that was carried on under the name of Morris Sellers & Co. in the manufacture of railroad spikes, etc., and so continued to be for a period of about four-

Greer v. Sellers.

teen years prior to June, 1891. In the last named month they organized a corporation, under the laws of Illinois, for carrying on the same business in the name of Morris Sellers & Co., incorporated, with a capital stock of \$100,000, divided into one thousand equal shares, of which the said Morris Sellers owned 499 shares, the appellant 499 shares, and a son of each of them one share. None of the capital stock was paid for in cash by either of the shareholders, but it was based on the estimated value of certain patents owned by the old firm and the going business, and each of the parties took, as stated, one-half of the shares—the two shares to the sons being given apparently to facilitate the organization of the corporation.

Morris Sellers was made president and treasurer, and the appellant secretary, and they, with their two sons, constituted the board of directors. Morris Sellers had charge of the finance and contracting, and Howard Greer had charge of the manufacturing part of the business at the mill.

Such relative interest and management of the parties in the corporation always remained the same down to the time said proposition was made.

At length, difficulties arose between the Greers—father and son—on the one side, and the Sellers—father and son—on the other, with the result of the foregoing proposition being made by the elder Sellers to the elder Greer.

It seems to be plain that the two sons were mere nominal shareholders and mere formal directors in the corporation, and that the corporation was in substance owned equally, and controlled by the elder Sellers and the elder Greer.

Wherever in the record any action of the board of directors is shown, the sons invariably acted with their respective fathers, and it is quite plain they exercised no independent judgment in the affairs of the corporation.

The proposition so made by Sellers to Greer was immediately accepted by the latter, and with the consent and knowledge of both parties, including their respective sons, the machinery which Greer was to take was, within a few days, begun to be removed from the factory to another shop or factory provided by Greer in a different part of the city.

The teamster who, by contract with Greer, did the moving, testified concerning what he removed as follows:

"Along about September 1, 1894, I did teaming for Howard Greer; was asked to figure on moving a lot of machinery and stuff. I came to his office; Greer sat at a desk opposite, and he introduced me to Sellers, and said: 'This is the man that was figuring on moving the stuff away.' I did not agree on the terms that day, but a day or two afterward the price was set, and I went on and did the work. The Morris Sellers referred to was the old gentleman. This conversation took place at the factory. We had always done work for Morris Sellers & Co., and did it after this material was removed; it would be difficult to describe the material moved; a lot of rolls, a stamping machine, weighing fifteen or eighteen tons, a promiscuous lot of stuff. The machinery was used for making railroad spikes; should think I moved about 200 tons in a day; could not tell exactly how much, because I would get loads at my convenience; did the job under contract, not by the day. I carried all this machinery and stuff from the factory of Morris Sellers & Co. to Austin avenue."

And it is otherwise made to appear that all the machinery and appliances, including the loan of "Machine No. 4," excepting an annealing furnace which, for the convenience of the Sellers company, was not taken, were actually removed to the new place of business provided by Greer, and there is no question but that the removal was made with the knowledge and consent of the Sellers, father and son.

In substance, all that remained to be done under the proposition was that Sellers should pay the sum of \$1,800 and assign the patents to Greer, and that Greer should surrender the stock held by himself and son, and furnish the set of templets, or, as they are spoken of, templates. The unfinished orders were completed by Greer, as provided in the proposition, and he subsequently, on November 7, 1894, offered to deliver the stock of himself and son, duly assigned, and tendered the templets, and demanded the annealing furnace and an assignment of the patents to him.

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On September 18, 1894, the attorney of Morris Sellers prepared, and Sellers presented to Greer, a more formal proposition, signed in the name of the corporation by Morris Sellers, its president, referring to their mutual understanding and embodying substantially the same propositions as were contained in the original proposition of September 4th, with the addition of what appear to be mainly matters of detail, and some provisions with reference to mutual releases.

Greer testified, and there was no contradiction of his testimony in that regard, that he was satisfied with the paper so prepared except as to two matters, one giving an additional month's time to finish some splice bar orders from machine No. 4, and the other that the papers should be executed by the son of Sellers, as well as by the son of Greer, who, it was expressed in the proposition, should join in the papers; and that Sellers agreed to have such changes made, but never again brought the paper to Greer.

It does not appear that anything further was done toward completing the agreement of the parties, except that several meetings of the directors and stockholders of the corporation were held between September 25, 1894, and October 29, 1894, at which ratification of the proposition of September 4, 1894, was considered, but was always defeated by Sellers and his son voting for delay, or by Sellers, as chairman, refusing, upon various pretexts, to put the motion.

It appears that after about September 4, 1894, which was the date of the proposition made by Sellers to Greer, the appellant Greer ceased to have anything to do with the affairs of the corporation, except to finish the work mentioned in the proposition, but such affairs were thereafter wholly managed by Sellers.

On November 9, 1894, two suits were begun against the corporation, in which suits pleas were filed by authority of Sellers, and without the knowledge of Greer, admitting the amounts claimed in each, and judgments therein for about \$28,000 were rendered on November 20, 1894, and the property of the corporation was levied upon under executions

issued thereon. This bill was then filed on November 22, 1894, and on November 26, 1894, the appellant Greer and his son filed another bill, charging that Sellers was wrecking the corporation, and praying for a winding up of the corporation and the appointment of a receiver.

Under the last named bill a receiver of the corporation was appointed, and by order of the court all of the machinery and appliances removed by Greer in pursuance of said proposition, were taken possession of by the receiver. And subsequently, the same, together with all the other property of the corporation, including all the letters patent referred to in said proposition were sold by the receiver, under the directions of the court, to one of said judgment creditors; but the inference is strong from all the evidence that the property so bought by the creditor was afterward turned over to Sellers, who formed a new corporation and continued to carry on the same business at the old place.

There can, we think, be no question but that the proposition made by Sellers and accepted by Greer constituted a valid contract.

And although relating to personal property, yet embracing letters patent, which, according to all the evidence, gave to the machinery and appliances that were mentioned substantially all the value they possessed, it was such a contract as equity will enforce the specific performance of.

And being a contract which may be specifically enforced, if by reason of events occurring subsequent to the filing of the bill a specific performance can not be decreed, equity, having obtained jurisdiction, will proceed and award all damages for non-performance which, under other circumstances, might be recoverable only at law. 1 Pomeroy's Eq. Juris., Secs. 237 and 238.

So here, the contract being one that specific performance of would be enforced under the circumstances existing at the time the bill was filed, and by subsequent proceedings in another suit the subject-matter of the contract having been sold by the receiver, in that suit, and thus put beyond reach in this suit, the court should have gone on and deter-

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mined what, if any, damages the complainant was entitled to for the failure of Sellers to perform the contract.

The point is made that because it was in a suit brought by Greer for the appointment of a receiver and a winding up of the corporation, that the subject-matter of the contract was sold by the receiver, Greer is estopped from claiming damages. But we think not. That other suit was not begun until after Sellers ought to have performed his contract, and after he had refused to do so.

Greer was not required to stand by and see the property of the corporation, without fault on his part, wasted by them into whose hands its management had fallen.

The patents, without which the machinery which had been delivered to Greer was comparatively valueless, still remained within the legal control of the corporation. The corporation, acting through Sellers as its president, had practically confessed judgments for a large amount, and there was danger that through the connivance of Sellers the patents which under the contract ought to have been assigned to Greer, would become utterly lost to Greer, to whom they rightfully belonged.

Under such circumstances Sellers ought not to be permitted to say that because Greer filed a bill for a receiver of the corporation, through whom the patents as well as the other property of the corporation was sold to pay its debts, he, Sellers, should be relieved from damages because of his refusal to carry out the contract.

But the further point is urged that Sellers is not accountable in any sense, because he contracted to deliver to Greer property which was not his own, but belonged to the corporation.

We regard this as a mere subterfuge. Greer and Sellers were the only persons who possessed any beneficial interest in the corporation. Together they owned in equal proportions, all but two of its one thousand shares of capital stock, and those two excepted shares were held one apiece by a son of each of them. These sons were in the corporation as nominal shareholders only. They never paid any-

thing for their shares, and it is clearly inferable that they held the shares merely to enable the corporation to perform its functions, and to do in its affairs whatever their respective fathers wished or requested.

If Sellers, as president of the corporation, had assigned the patents to Greer, there would have remained no one but Greer to complain, and he would have been estopped from complaining by having contracted to accept them.

It is also manifest that had Sellers not wished it to be otherwise, he could have caused, by his mere vote, the proposition to be expressly ratified by the corporation at any one of the numerous stockholders' or directors' meetings that were held to act upon his proposition. Therefore, to say, as Sellers' counsel do, that Sellers could not have legally performed his contract, is to argue idly.

Moreover, everybody, shareholders and directors, who had any interest in the corporation, knew of the contract that Sellers had made, and stood by and assented to the performance of substantially everything that remained to be performed under it on Seller's part except the assignment of the patents.

Ratification is as susceptible of being made by a corporation as by an individual, and it is not always necessary that either the board of directors, as such, or that stockholders specially convened, should expressly act upon the subject-matter needing ratification.

There may be ratification by acquiescence and general conduct, under a knowledge of all the facts, as well as by express action.

"A corporation, like an individual, may be bound by a ratification evidenced by its acts, and such ratification need not be in writing, even though it be of an act done without authority." *L. N. & C. Ry. Co. v. Carson*, 51 Ill. App. 552; same case, 151 Ill. 444.

Here was a contract entered into and largely executed, between two persons who were alone interested in the affairs and property of the corporation, to divide up between themselves the whole of the corporate property, and sever

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their interests in that property. It was agreed by both parties that their continued association within the corporation was opposed to the interests of the corporation as well as to their individual interests. It was clearly within the power of the contracting parties to make effectual their agreement to separate by doing what they legitimately might do, and they agreed to do it.

One of the parties thereupon determines that he will not perform what he has agreed to do, and has the power to do, and seeks to shelter himself behind a pretext that the corporation must act, and having the power to prevent the corporation from acting, does so, and then says he should be relieved because the corporation has not acted. This is inequitable, and should not be permitted.

It is said there were creditors of the corporation whose assent was necessary. Creditors, as such merely, had no interest in the corporation. It was clearly a solvent corporation, and the inference is very strong that any subsequent difficulties into which the corporation was plunged, were brought about by the procurement of Sellers for the express purpose of wrecking the corporation and obtaining for himself the whole of the corporate property, as he appears to have done, through the aid of the creditors he set in motion.

The Superior Court should have held the bill for the purpose of ascertaining what, if any, damages the appellant is entitled to for a failure by Sellers to perform his said contract, and the decree is reversed and the cause remanded for that purpose.

August Tarkovsky v. George H. Hess Company.

1. *Rent—Where Premises are Destroyed by Fire.*—Under a lease which provided that upon the destruction of the premises by fire, the term created thereby should cease and determine, and also that the rent should be paid monthly in advance, a proportion of the rent can not be

recovered back when the premises are destroyed before the end of the month for which it was paid.

Assumpsit for money had and received. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

FLOWER, SMITH & MUSGRAVE, attorneys for appellant, contended that it is an elementary principle of law that failure of consideration is a good defense to an action upon a contract, and while under the common law the destruction of buildings did not release the tenant from payment of rent, without an express contract to that effect, the rule was said by law writers to be founded upon the fact that the profits were supposed to be obtained from the land itself, which still remained; but where there was a destruction of the subject-matter of the lease no rent could be recovered. *Hart v. Windsor*, 12 Meeson & Welsby, 79; *Graves v. Berdan*, 29 Barb. 102; *Coogan v. Parker*, 2 S. C. 274.

Hence, where the lease is only of apartments, distinct from the land, it is held that the destruction of the building operates as a termination of the lease, and the tenant is no longer required to pay rent. *Kerr v. Merchants' Exch. Co.*, 3 Edw. Chy. 314; *Parker v. Gibbons*, 1 Queen's Bench 421; 2 Wood's *Landlord & Tenant* (2d Ed.), 1032; 12 Am. & Eng. Ency. of Law 757; *Harrington v. Watson*, 11 Ohio 67.

The cases where this question has arisen are very rare, and counsel have not been able to find any adjudication in this State. They cite *Porter v. Tull*, 6 Wash. 408; 22 L. R. A. 613; *May v. Rice*, 108 Mass. 150; *Rich v. Smith*, 121 Mass. 328.

POPE & SMALL, attorneys for appellee.

There is no authority upon this question to be found in the reports applicable to a common law suit. The case of *Porter v. Tull*, 6 Wash. 408, is of no authority or weight in this State in a common law action. Washington is a code State, and the decision is based entirely on the equity rule

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of apportionment, which has been decided in this State not to apply to common law actions on contracts. *Crosby v. Loop*, 14 Ill. 330; *Adler v. World's P. Ex. Co.*, 126 Ill. 373, 377; *American Publishing Co. v. Wilson*, Chicago Legal News, Vol. 28, No. 33, page 269; 63 Ill. App. 413.

The general principle has been decided by our Supreme Court that the destruction of the premises by fire in the absence of an express stipulation to the contrary does not release the tenant from the payment of rent. *Barrett v. Broddie*, 158 Ill. 479; 57 Ill. App. 226; *Smith v. McLean*, 123 Ill. 210.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a suit brought by appellant to recover back the proportional part of a month's rent paid by him in advance for premises destroyed by fire during the month for which the rent was paid.

The rented premises consisted of all of the third floor and of portions of the second and fifth floors of a building in Chicago.

The monthly rent was \$276, which, on March 4, 1891, was paid for that month, and on the eleventh day of the same month the building was substantially destroyed by fire.

The lease contained the following provision:

“Upon the destruction of said premises by fire, the term hereby created shall cease and determine.”

There is no contention but that the lease became terminated by the destruction of the premises by fire.

The lease also provided that the rent should be paid in advance for each month of the term, and it was so paid for the month in question.

Can a proportionate part of such payment be recovered back? We think not. The contract of the parties ought to govern. They provided by their agreement how the rent should be paid, but did not agree that the rent should be abated for any part of the time for which it should be paid in case the premises should be destroyed.

Their only agreement with reference to a destruction of the premises, was that the lease should thereupon terminate and, impliedly, that no more rent should accrue. Such was probably the law without any agreement.

But as to rent previously paid they made no provision, and we do not feel called upon to make one for them. As we view the case, the risk of the lease being terminated before the time expired for which rent was paid, was upon the party paying. That was in effect what his contract was when he agreed to pay in advance.

Even were we to assume that the case of *Porter v. Tull*, 6 Wash. 408, decided by a divided court, is in point and applicable, we are not inclined to follow it.

We think the judgment below in favor of the appellee, denying the right of appellant to recover back any part of the rent paid, was right, and it will therefore be affirmed.

Northwestern Brewing Company v. Whitfield N. Alley.

1. **TROVER—What Amounts to a Conversion.**—A defendant in execution made a schedule of his property in a certain saloon, and claimed his exemption, which was allowed, the property delivered to him, and by him sold to a third person. As soon as this was done, another person holding a chattel mortgage upon other property seized all the property in the saloon, among which was the property scheduled, and prevented the removal of the same, directed that the keys should not be given up, refused to give up the property after demand, etc. *Held*, that such acts amounted to a conversion of the property.

Trover.—Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

STATEMENT OF THE CASE.

This was an action of trover brought by one Whitfield N. Alley against the Northwestern Brewing Company for the alleged conversion of personal property.

All of the property was, in the year 1890, located in the

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building known as 156 Webster avenue, Chicago, and constituted the fixtures and furniture of a saloon which was carried on at that place. The saloon was owned and operated by one B. A. L. Thomson. Thomson was indebted to the Northwestern Brewing Company, defendant, in the sum of \$1,200, for which he gave the brewing company judgment notes secured by a chattel mortgage upon the property mentioned.

In June, 1890, the brewing company took judgment upon its judgment notes, sued out an execution and levied upon most of the property, and sold a portion of the same.

Thereupon Thomson made a schedule of his property and claimed his statutory exemptions, which were allowed to, and properly delivered to him, whereupon he sold the property he had thus received to appellee.

As soon as the property so selected was delivered to Thomson, the brewing company foreclosed its chattel mortgage upon the property mentioned in its mortgage, and also, as is claimed by appellee, took possession of property he had bought at the execution sale, and property sold to him by Thomson, not covered by the mortgage, and took possession of that property.

The case was tried by the court without a jury.

The court found the defendant guilty of converting a portion of the property mentioned in the declaration, and rendered judgment against the defendant for about \$350 and interest, amounting in all to \$482.

LACKNER & BUTZ, attorneys for appellant.

DAVID J. WILE, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

From an examination of the abstract and briefs filed in this cause, we are of the opinion that the finding of the court should be sustained. Only questions of fact are involved.

We think that the court was justified in concluding that appellant immediately upon the setting aside to the judgment debtor of the articles claimed as exempt by him, seized all the property in the saloon; that it prevented the removal of such property, directed that the keys should not be given to the plaintiff, and never returned or offered to return the same, although a demand was afterward made by appellee for the property claimed by him. We do not find the evidence such that we would be warranted in reversing the conclusion of the Circuit Court; its judgment is therefore affirmed.

Charles L. Schaar et al. v. Maurice Weil et al.

1. **EVIDENCE—Upon Collateral Issues.**—Evidence upon a collateral issue, although admissible, may be stricken out without necessarily requiring the court to set aside the verdict in the case.

Assumpsit, for rent. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

WEIGLEY & EASTMAN, attorney for appellants.

MARTIN S. ISAACS, attorney for appellees.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action by the appellants for rent.

There are two questions of fact; first, whether the appellants ever had anything to rent; second, whether the appellees ever did rent anything from the appellants. The court instructed the jury as the appellants desired, except one peremptory instruction to find for them refused, and the whole argument for the appellants now is that the court wrongly admitted evidence which it afterward struck out, and wrongly denied the motion for a new trial. The ap-

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pellants began their proof before the jury by the introduction of a deed conveying the premises in controversy to themselves, by Hannah J. Tierney and her husband, Thomas J. Tierney, and followed with evidence of a parol demise from themselves to the appellees.

In the premises, business had been conducted by a T. J. Tierney Mfg. Co., which, we infer, was another name for Thomas.

That manufacturing company was indebted to appellants, and whether the deed was in satisfaction of that debt, and possession taken by appellants under it, or whether it was a security for the debt, and possession retained by the Tierneys, was the first question. Upon that question the evidence to which objection was made, and which the court struck out, was admissible. The appellees admitted that some goods bought by the appellants at a sheriff's sale, and by them sold to the appellees, remained upon the premises, but denied that the appellees ever were in possession of the premises, and denied that they ever rented them from anybody, but alleged that they left the goods there by permission of "Mr. Tierney."

Had the appellants begun by the effort to prove only a demise to the appellees, and said nothing about their title, it may be that the issues would have been much narrower, and that the appellees would or ought to have been confined to denying the demises. Taking the course they did, the appellants can not object to evidence bearing upon the issue they presented; namely, absolute ownership and possession of the premises.

The error of the court in striking out the evidence did not require the court to set aside a verdict founded upon it.

There was therefore no error in denying the motion for a new trial, and the judgment is affirmed.

64	520
66	480
64	520
d98	672
d98	678
64	520
100	7 48

L. Gustav Hallberg v. Z. P. Brosseau.

1. ERRORS—*Assigned but Not Argued.*—Errors assigned and not argued will not be noticed.

2. PRACTICE—*Request for Instructions.*—A motion for the court to instruct the jury, without presenting the instructions, is not sufficient to base an assignment of error upon.

3. SAME—*Additional Pleas.*—Under the statute a defendant has at first the right to plead as many pleas as he desires to, but when he asks to file additional pleas thereafter the court may, and if such additional pleas tend only to confusion and delay, ought to, refuse leave to file them.

4. NEW TRIALS.—*Verdict too Small.*—A motion for a new trial should be allowed where the verdict is for a less sum than the evidence shows the party is entitled to.

5. JUDGMENTS—*Must Follow the Verdict—Exception.*—No court is authorized to enter a judgment upon a verdict for a greater sum than the verdict, except for interest accrued in the interval between the two.

6. PLEADING—*No Consideration to Sealed Instrument.*—A plea of no consideration in an action upon a sealed instrument is bad unless it is such an instrument as is within section 9, chapter 98, R. S., entitled Negotiable Instruments.

7. SAME—*Statute of Frauds.*—A plea setting up the statute of frauds in an action upon an instrument in writing, is a personal privilege.

Assumpsit, on a guaranty under seal indorsed upon a lease. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed June 1, 1896.

JNO. R. MONTGOMERY, attorney for appellant.

SAMSON & WILCOX, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Errors assigned and not argued, will not be noticed. Cook v. Moulton, 59 Ill. App. 428.

The action is assumpsit upon a guaranty under seal, indorsed upon a lease, of the performance of the covenants of the lessee.

The issues upon which the case was tried, were, first, upon

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non-assumpsit, and second, whether the appellant accepted from the lessee a promissory note running thirty days as payment of \$400 of the rent sued for. Upon the second issue there is no evidence tending to justify the verdict, which in effect finds that issue in favor of the appellee.

All there was of that transaction was that the lessee asked the agent of the appellant if the appellant would not take a note, and he did not know; the lessee sent the note, and called on the appellant shortly before it was due, and told him that she could not pay it, and he gave it back to her.

A motion that the court instruct the jury, without presenting the instruction, is not sufficient to base an assignment of error upon. *Wenona Coal Co. v. Holmquist*, 152 Ill. 581; *Ames & Frost Co. v. Stackurski*, 46 Ill. App. 310.

We need not consider the abstract question of the right of the appellant to a specific instruction that the jury should find for him a sum named in the instruction, as no such instruction was asked. But upon the evidence no effect should be given to the transaction of sending the note. *Cheltenham S. & G. Co. v. Gates Iron Works*, 124 Ill. 623.

Eight hundred and fifty dollars of rent was due, and the jury found for the appellant \$450.

The motion of the appellant for a new trial because the verdict was for a less sum than he was entitled to, should have been granted; but his motion for a judgment *non obstante veredicto*, and his appeal to this court to give him a judgment for \$850, are both in disregard of the right of the appellee to a trial by jury.

The record was in no shape to warrant the motion for judgment *non obstante* (*Florsheim v. Dullaghan*, 58 Ill. App. 626), and no court is authorized to enter a judgment upon a verdict for a sum greater than the verdict, except for interest accrued in the interval between the two. Sec. 3, Ch. 74, "Interest;" *Hirth v. Lynch*, 96 Ill. 408; *Frazier v. Laughlin*, 1 Gilm. 347; *Hinckley v. West*, 4 Gilm. 136.

The appellee assigns cross-errors because to some of his pleas demurrers were sustained.

First, no consideration for the guaranty. This is no plea to a sealed instrument, unless it is such an instrument as is within Sec. 9, Ch. 98, "Negotiable Instruments."

The statute is the same in substance now as it was in 1841, when in *Dunbar v. Bonesteel*, 3 Scam. 32, it was held that a lease was not within it; and practically the guaranty and lease are one instrument. *Otto v. Jackson*, 35 Ill. 349.

Second, that the lease was not signed by the appellant or by any one by him in writing authorized. The purpose seems to be to set up the statute of frauds; which is the personal privilege of the appellant only. *Chicago Dock Co. v. Kinzie*, 49 Ill. 289.

If intended to dispute the execution of the lease by the appellant for the purpose of showing that no estate passes, or demise was made, *L. N. A. & C. Ry. v. Carson*, 51 Ill. App. 552, 151 Ill. 444, is authority that permitting the lessee to enter under it (which being shown by the declaration and not denied by the plea is admitted), is a ratification by the appellant of the lease. Other pleas are inartificial pleas of termination of the lease by different causes after most, if not all, of the rent sued for accrued, and being pleaded to the whole action, were bad for that, if no other reason.

This action is *assumpsit*. Most good defenses are admissible under the general issue. 1 Ch. Pl., 419, Ed. 1828.

While under the statute the defendant has the right to plead, at first, as many pleas as he will, yet when he wishes to put in additional pleas thereafter, the court may, and if such additional pleas tend only to confusion and delay, ought to, refuse leave to file them. *Bemis v. Horner*, 44 Ill. App. 317; 145 Ill. 567; *Dow v. Blake*, 46 Ill. App. 329; 148 Ill. 76.

However instructive to attorneys to practice their skill in pleading, the end does not justify the means.

For anything indicated by this record, the appellant ought to recover all unpaid rent, with interest since it became due.

The judgment is reversed and the cause remanded.

Thomas Knapp Printing and Binding Company v. J. C. Guthrie.

1. **EVIDENCE—Tending to Prove an Issue, Competent.**—In a controversy to determine whether the words “ninety cents an hour double time” was ninety cents an hour, itself doubling the time by doubling the price, or whether the ninety cents were to be doubled, making one dollar and eighty cents, as the wages fixed for certain night work, it is competent to show, on cross-examination, that the person claiming the latter construction was at work in the day during the same time for forty-five cents an hour.

Assumpait, for work, labor and services. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHELTAIN, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed June 1, 1896.

FLOWER, SMITH & MUSGRAVE, attorneys for appellant.

SHUEY & GANN and P. V. HOFFMAN, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant employed the appellee to do some work which necessitated shutting down machinery, and therefore the appellant wanted it done of nights and Sundays. The only contest in the case is whether ninety cents or a dollar and eighty cents an hour for the work is the proper charge.

The appellee says the bargain was—and in this he is corroborated by his helper—that the charge was to be “ninety cents an hour double time.” The president of the company who made the bargain, says it was ninety cents an hour.

A witness for the appellant testified that he sent the appellee to the appellant, that during part of the time that the appellee was at work on this job of nights, he was also at work for the witness in the daytime, at work of the same character and somewhat harder, at forty-five cents an hour for the appellee and his helper. The appellee on cross-

examination admitted that during a part of the time he was on this job, he was engaged during the day working for that witness, but when asked what rate of compensation he received for that day work, the court sustained an objection of the appellee to the question, and the appellant excepted. This was error. The jury for some fanciful reason may have discredited the witness, but they could not well have refused to believe the appellee against himself.

The real question before the jury was, assuming that the appellee testified truly that the words of the bargain were "ninety cents an hour double time"—was the ninety cents an hour itself doubling the time, by doubling the pay for the time? If the fact was that it was double pay, then the reasonable proper construction of the words was in favor of the appellant, and it should have been allowed to prove the fact by such testimony as the appellee could not have disputed.

It is unnecessary to consider the instructions, or the pertinency of the evidence in rebuttal.

The judgment is reversed and the cause remanded.

MR. JUSTICE SHEPARD dissents.

MR. JUSTICE WATERMAN.

Appellee claimed under an alleged special contract; this, as stated by him, is so ambiguous that its meaning is uncertain. The members of this court have been unable to agree as to the meaning of what appellee testifies was said, what he claims, constituted a special agreement.

It may be that if the court were in possession of all the facts known to each of the parties when this conversation was had, the significance of the language employed would be clear; the amount which appellee was then receiving for ordinary hours, if known to appellant, would throw light upon what was said. The alleged special contract being no agreement, because uncertain, appellee can recover a *quantum meruit*. What under the circumstances was a reasonable compensation is what, in the absence of a special contract, he is entitled to.

Clafin Co. v. Kelley.

H. B. Clafin Company v. Charles B. Kelley.

64	525
66	348
64	525
169	201

1. **ASSIGNMENTS—For the Benefit of Creditors—Filing Claims.**—The fact that a claim is in litigation during the time for filing claims with an assignee under the act relating to voluntary assignments is no excuse for not presenting it to the assignee.

2. **SAME—Claims Filed After Three Months.**—A claim not filed within the three months allowed for filing claims under the assignment act, can not share *pro rata* in the assets and no equitable consideration can entitle the claimant to relief.

3. **SAME—When the Assignee is Personally Liable.**—If an assignee by fraudulent means prevents a creditor from filing his claim within the three months, such conduct does not extend the time for filing claims, but may render the assignee personally liable.

Voluntary Assignments.—Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

STATEMENT OF THE CASE.

During the winter and spring of 1893 the Imperial Hotel Company purchased certain ground near the north end of Jackson Park in Chicago, and erected thereon a building and called it the Windermere Hotel; before the completion of said building it contracted with appellant for a large amount of goods for furnishing said hotel ready for use during the World's Fair; the goods were shipped and some of them began to arrive before the 20th day of May, 1893, but before all of the goods were delivered, A. C. Mills & Co. was organized as a corporation to operate that hotel under a lease from the Imperial Hotel Company, and all of the said furnishings that had been delivered were transferred to said A. C. Mills & Co., and although all of the goods that arrived thereafter were consigned to the Imperial Hotel Co., they were received and used by A. C. Mills & Co.; that this transfer was the result of an agreement between said two companies, wherein it was agreed that A. C. Mills & Co. should operate said hotel and pay to the Imperial Hotel Company a certain amount of its profits and pay the in-

debtedness due to the H. B. Claflin Company, both companies being liable for the indebtedness and both having some interest in the hotel property.

Thereafter, on the 17th day of October, 1893, both the Imperial Hotel Company and A. C. Mills & Co. executed deeds of voluntary assignment to Charles B. Kelley, as assignee of each company, the officers of said Imperial Hotel Company being also the officers of A. C. Mills & Co.

The assignee did not obtain possession of any property under either of said assignments at any time, but on or about the 1st of June, 1894, a sale was had in the County Court of all interests of the assignee in the property of said Imperial Hotel Company, subject to all rights of said receiver, who was then in possession thereof, and some money was received for that interest of the assignee, which is all of the assets belonging to said insolvent estate.

The assignee did not publish notice immediately after the execution of said assignment to all the creditors of said Imperial Hotel Company to present claims to him within three months after such notice, and he did not make any inventory of the property of said Imperial Hotel Company immediately after the said assignment; but did publish a notice on the 6th day of January, 1894, about three months after the making of said assignment and before he had obtained possession of any assets of any kind whatsoever, and the assignee, on March 21, 1894, filed an inventory of the property in the possession of said receiver; but at no time did the assignee file a report or inventory of the property in his own possession, not even after he had obtained the proceeds of said sale.

The H. B. Claflin Company, appellant, did not receive a copy of said notice, nor any knowledge that such notice was published; but it did know that said receiver was still in possession of said property, and that no inventory had been filed in the assignment matter, and that no property was in possession of the assignee up to February 10, 1894.

On the tenth day of February, 1894, the H. B. Claflin Company began suit in the Superior Court of Cook County against both the Imperial Hotel Company and the said A.

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C. Mills & Co., upon the indebtedness due it for the goods sold as above mentioned.

As a defense to this suit, both of said companies filed their separate pleas of non-assumpsit. A trial was had upon the issues they formed in that suit, resulting in a judgment being rendered on July 27, 1895, against both said defendants, jointly, for the sum of \$26,487.35. Thereafter the record of that case was taken to the Appellate Court and the judgment was affirmed; and thereafter was taken to the Supreme Court, where it was still pending when the amended petition was filed on November 6, 1895.

But after the said suit was begun and said pleas of absolute defense had been filed, supported by affidavits, the H. B. Claflin Company received knowledge in some way that said assignee's notice had been published, but after the three months from the date of said notice had expired, and it filed a petition in the said County Court of Cook County on the tenth day of May, 1894, in this assignment matter, setting forth its claim, and stating therein that suit had been brought thereon in the said Superior Court, and that said defense had been made thereto by both of said companies, and that thereby the result of said suit was rendered uncertain. At that time the assignee had not yet received any assets of any kind as such assignee of the Imperial Hotel Company.

Thereafter the H. B. Claflin Company filed its amended petition by leave of court on the sixth day of November, 1895, setting forth the recovery of said judgment, the affirmance of the same by the Appellate Court, and that the case was then pending in the Supreme Court, and it petitioned the court for leave to file its claim with the assignee and share in all of the assets of said insolvent, prorating with all other creditors who might be permitted to participate therein. No dividend had at that time been ordered or paid by the assignee.

To said amended petition of November 6, 1895, the appellee demurred, and his demurrer was sustained, and the petition of the H. B. Claflin Company dismissed, and there

upon it prayed an appeal to this court, which appeal was allowed on its filing bond in the sum of \$500, within sixty days after November 11, 1895.

In its amended petition of November 6, 1895, the H. B. Clafin Company, the appellant, charges fraud on the part of the assignee, in that said assignee conspired with one Joseph H. Defrees, the president of both the said A. C. Mills & Company and the said Imperial Hotel Company, to enter the defenses to said suit in the said Superior Court, and thereby prevent appellant from obtaining judgment in time to file its claim, properly sworn to, with said assignee before the expiration of three months mentioned in said assignee's notice, and that, as a part of said scheme, the said assignee did not send any notice by mail to the said H. B. Clafin Company, but strictly avoided doing anything that would call its attention to said published notice.

The County Court held that the claim was filed too late to share *pro rata* with claims filed within the three months.

JAMES A. FULLENWIDER, attorney for appellant, contended that where a claim against a bankrupt estate is in suit and undetermined during the three months after the publication of notice by the assignee during which claims are required to be presented, it will not be barred for non-presentation within three months. *Suppiger v. Gruaz*, 36 Ill. App. 60.

EDWARD S. ELLIOTT, attorney for appellee; ALDRICH, REED, BROWN & ALLEN, of counsel.

The statute must be strictly construed and effect given to its express language, that creditors who shall not file their claims within three months from publication of notice, shall not participate in the dividends until after the payment of claims presented within said time, and allowed by the court. *Starr & Curtis' Revised Stat.*, Ch. 72, Par. 46, Sec. 10; *Suppiger v. Seybt*, 23 Ill. App. 468; *Bank of Rondout v. First Nat. Bank*, 37 Ill. App. 296; *People v. White*, 11 Ill. 341; *Kean v. Lowe*, 147 Ill. 564.

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The fact that two months elapsed between the assignment and the publication of notice thereof by the assignee, and notice to creditors to present their claims, does not in the least degree invalidate said notice. Delay in the giving of the notice provided for by paragraph 38 of chapter 72, whether from neglect or mistake, does not affect the validity of the notice when given. Starr & Curtis' Revised Stat., Ch. 72, Par. 38; Crandall v. Carey-Lombard Lumber Co., 63 Ill. App. 320.

Appellant should be permitted to file its claim now, but should not be paid until after the payment in full of all claims filed within three months from the publication of notice. Starr & Curtis' Revised Stat., Ch. 77, Par. 46; Kean v. Lowe, 147 Ill. 564.

The assignee complied with the law in all respects relating to taking possession of the insolvent's estate, and the filing of an inventory thereof. He had only such a right to possession as the assignor had at the time of the assignment. Levy v. Chicago Nat'l Bank, 57 Ill. App. 143.

The publication and mailing of notice by the assignee was strictly in accordance with law, and its effect absolutely bars appellant's claim to prorate with those filing claims within three months from the publication of such notice; and this, whether or not such notice came to the knowledge of appellant. Suppiger v. Seybt, 23 Ill. App. 468; Winona Paper Co. v. First Nat'l Bank, 33 Ill. App. 632; Kean v. Lowe, 147 Ill. 564; Field v. Ridgley, 116 Ill. 424.

That a claim is litigated and disputed during the time to file claims, is no excuse for not presenting it to the assignee. Suppiger v. Gruaz, 36 Ill. App. 60; 137 Ill. 216; Dugger v. Oglesby, 99 Ill. 410, distinguished.

There was neither fraud, neglect, misconduct nor conspiracy on the part of the assignee, whereby appellant was prevented from filing its claim. Field v. Ridgley, 116 Ill. 424; Merwin on Eq. and Eq. Pl., Sec. 692; Sechrist v. Petty, 109 Ill. 188; Daniell's Chy. Pl. & Pr. 546; Robinson v. Brown, 82 Ill. 279; Hangesleben v. People, 89 Ill. 164; Taylor v. Adams, 115 Ill. 570.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Sec. 10 of the act relating to voluntary assignments, chapter 72 of the Revised Statutes of Illinois, reads as follows:

"And all creditors who shall not exhibit his, her or their claim within the term of three months from the publication of notice as aforesaid, shall not participate in the dividends until after the payment in full of all claims presented within said term and allowed by the County Court."

That a claim is litigated and disputed during the time to file claims, is no excuse for not presenting it to the assignee. *Rassieur v. Jenkins, Assignee*, 64 Ill. App. 336; *Snydacker v. Swan Land Co.*, 154 Ill. 220.

The Illinois statute concerning assignments was taken largely from the Iowa statute. In that State the Supreme Court hold that a claim filed after three months can not prorate, and that no equitable considerations whatever entitle the claimant to relief. The following decisions of the Iowa Supreme Court have been frequently cited and followed by the courts of Illinois: *In re Holt*, 45 Ia. 301; *McKindley v. Nourse*, 67 Ia. 119; *Loomis v. Griffin*, 78 Ia. 482; *Carter v. Lee*, 47 N. W. Rep. 1014; *Conlee Lumber Co. v. Meyer*, 74 Ia. 403; *Smith v. Wheeler*, 12 N. W. Rep. (Ia.) 626; *In re Stewart*, 43 N. W. Rep. (Ia.) 296; *Budd v. King*, 48 N. W. Rep. (Ia.) 296; *Clendenning v. Perrine*, 49 N. W. Rep. (Ia.) 334; *Scott v. Thomas*, 62 N. W. Rep. (Ia.) 790.

It is not alleged that the petitioner did not have knowledge of the assignment. If the assignee conspired and by fraudulent means prevented the petitioner from filing its claim within the three months, such conduct did not extend appellant's time to file such claim. The petitioner should in such case proceed against the assignee personally.

The order of the County Court is affirmed.

Thomas S. Corrigan v. J. J. Reilly et al.

1. **PRESUMPTIONS—Upon the use of the Term “Common Counts.”**—Where the abstract shows that the declaration contained the “common counts” in assumpsit the court will assume that a count for work, labor and materials, and a count upon an account stated were among them.

2. **SAME—Directions to Workmen.**—Where a person in giving directions to have work done gives no information that he represents another, and there is nothing in the evidence showing such fact, he will be personally responsible.

3. **SAME—As to Judgments.**—A judgment is presumed to be correct unless the contrary is shown.

4. **SAME—Absence of Pleadings in an Abstract.**—Unless the abstract shows pleadings which the evidence will not fit, the court will presume that there were appropriate pleadings.

Assumpsit.—Common counts. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

PRENTISS, HALL & GRIGGS, attorneys for appellant.

STEELE & ROBERTS, attorneys for appellees, contended that the taking of a promissory note for a pre-existing debt is treated *prima facie* as conditioned payment; that is, as payment only if it is duly paid at maturity. *Heartt v. Rhodes*, 66 Ill. 351; *Cheltenham Stone & Gravel Co. v. Gates Iron Works*, 124 Ill. 623.

A distinction should be made between an indebtedness and a note or other evidence of indebtedness. A note may be destroyed and the indebtedness still exist. Notes may be given but the indebtedness is not paid thereby, except by special agreement. The taking of a note of a third person by a creditor for a pre-existing debt of his debtor, is not payment unless it is expressly agreed that the note should so operate as payment. In the absence of a special agreement that the note shall operate as payment, the pre-existing debt is presumed to survive and exist. *Walsh v. Lennon*,

98 Ill. 27; Wilhelm v. Schmidt, 84 Ill. 185; Cheltenham S. & G. Co. v. Gates Iron Works, 124 Ill. 623; White v. Jones, 38 Ill. 160; Citizens Nat'l Bank v. Dayton, 116 Ill. 257.

MR. PRESIDING JUSTICE GAY DELIVERED THE OPINION OF THE COURT.

The abstract shows that articles of incorporation of the Montana Columbian Club were filed for record somewhere, June 20, 1893.

It does not show where they were recorded, nor when, nor what steps were first taken to organize such a corporation. Nothing in the abstract intimates the existence of any corporation before that date.

The abstract shows that the declaration contained the "common counts" in assumpsit; we will assume that a count for work, labor and materials, and a count upon an account stated were among them.

Some time in the spring of 1893, and early enough to have the job completed by May 6th of that year, the appellant directed the appellees to do the "job" of painting and decorating, the price or value of which, with interest, is the sum here in controversy.

We say with interest, and yet we only guess at that, for the abstract tells nothing of the amount recovered.

That the appellees earned \$552.95 and have been paid nothing, is not disputed. In giving directions to have the work done, there was no hint that the appellant represented anybody but himself, nor is there any hint in the evidence that there was then anybody whom he could have been the representative of.

He was, therefore, himself responsible for the value, and that is not disputed. The defense is that afterward the corporation gave its note for that value, guaranteed by the appellant, and still later, that such note was surrendered for other paper, none of which was ever paid. The liability of the appellant therefore remains. Cheltenham Stone and Gravel Co. v. Gates Iron Works, 124 Ill. 623.

This view of the case makes it unnecessary to discuss the

Strong v. Northwestern Elevated R. R. Co.

many abstruse questions raised by the instructions, and argued in the briefs.

The judgment is affirmed.

MR. PRESIDING JUSTICE GARY ON PETITION FOR REHEARING.

The petition quotes the testimony of the appellee Reilly that "I understood when I was doing this work, this place that was decorated was to be for the Montana Columbian Club. I understood this when Corrigan made out the ninety day note;" and argues that the personal liability of the appellant is thereby negatived.

How it follows that knowledge that the place was to be for a club, not shown to be then existing, rebuts the liability of him who ordered the doing of the work, without words hinting at any limitation upon the liability imposed by law for reasonable compensation for work done at his request, is not shown.

The petition says, "we do not think it is fair that the court should indulge in a presumption that the declaration contained a count under which the plaintiff could recover, and refused to refer to the record as to the date of the articles of incorporation."

A judgment is to be presumed correct unless the appellant shows the contrary. *Culver v. Scretch*, 153 Ill. 437.

Unless his abstract shows pleadings which the evidence would not fit, we presume appropriate pleadings, and unless it shows whatever evidence is supposed to be against the appellee, such evidence is not before us. *Wabash R. R. v. Smith*, 58 Ill. App. 419. This rule prevails even in criminal cases. *Strohm v. People*, 160 Ill. 582. The petition is denied.

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166s 907

Strong et al. v. Northwestern Elevated R. R. Co. et al.

1. **INJUNCTIONS—*By Abutting Property Owners.***—Abutting property owners can not have an injunction to prevent the construction of an elevated railroad upon the street.

Bill for an Injunction.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

HAMLINE, SCOTT & LORD, attorneys for appellants.

MORAN, KRAUS & MAYER, attorneys for appellees.

OPINION PER CURIAM.

Inasmuch as this court in the case of *Phelps v. Union Elevated Railroad Company*, 60 Ill. App. 471, held that street abutting property owners can not have an injunction to prevent the construction of an elevated railroad upon such street, on the ground that the ordinance of the city permitting such construction is invalid, we must affirm the decree of the lower court, dismissing the bill.

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Potter Palmer et al. v. Union Elevated R. R. Co.

Erskine M. Phelps et al. v. Union Elevated R. R. Co.

Columbus R. Cummings et al. v. Union Elevated R. R. Co.

1. **MEMORANDUM.**—See *Phelps v. Lake Street Elevated R. R. Co.*, 60 Ill. App. 471.

Bill for Injunction.—Appeals from an order of the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

GREEN, ROBBINS & HONORE, attorneys for appellants.

WILSON, MOORE & McILVANE, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The question in these cases was fully considered at the last term, upon appeals from interlocutory orders granting injunctions. For the reasons there assigned, the present decrees dismissing the bills are affirmed. *Phelps v. Lake Street Elevated R. R. Co.* is the head title under which five cases are reported, 60 Ill. App. 471.

Marsh v. Reed.

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s184-263

Margaret Marsh, Eleanor Aldrich, Louis S. Aldrich, F. Cornwall Sherman, Jr., Sherman Alexander Charles, Martha Charles and Frances Charles, by Gilbert E. Porter, their Guardian ad Litem, v. Edward H. Reed et al.

1. **TRUST ESTATES—Power of Chancery to Change.**—When necessity requires it, a court of chancery has power to change the limitations and provisions governing trust estates.

Bill to Change a Trust.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

GILBERT E. PORTER, guardian *ad litem* and attorney for appellants, contended that the court exceeded its jurisdiction in the premises; that the intention of the testator, as expressed in said clause, is clear and unambiguous, and the decree violates that intention; and that while in the light of the present condition of the property said restriction upon the power of the trustees to lease was unwise and now operates disastrously to the interests of the *cestuis que trustent*, yet a court of chancery can not interfere upon the sole ground of such unwise, but cited no authorities.

WILSON, MOORE & McILVAINE, attorneys for appellees. A court of chancery has power in cases of necessity to order a disposition of trust estates which is not in accordance with the provisions of the instrument creating the trust.

“A case may exist where the property was unproductive, as in this case, but where the *cestui que trust* was absolutely perishing from want, or forced to the poor-house, or where the trustee could not possibly raise the means to pay the taxes upon the property, and thus save it from a public sale

and a total loss. Can it be said that the beneficiary of an estate which would bring in the market \$100,000, should perish in the street from want, or be sent to the poor-house for support, or that the estate should be totally lost, because there is no power in the courts to relieve against the provisions of the instrument creating this trust? Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency." *Curtiss v. Brown*, 29 Ill. 501.

In the case of *Voris v. Sloan*, 68 Ill. 588, the court said: The first question, and that which lies at the threshold, is, whether the court has power to break in upon the terms of a trust, and to pervert or change the terms and conditions imposed by the creator of the trust. In the case of *Curtiss v. Brown*, 28 Ill. 201, after a review of the authorities, it was determined that the power might be exercised in extreme cases.

In *Dodge, conservator, v. Cole*, 97 Ill. 338, the cases of *Curtiss v. Brown*, *supra*, and *Voris v. Sloan*, *supra*, are cited with approval. In the case of *Longworth v. Riggs*, 123 Ill. 258, the court said:

"And in *Voris v. Sloan*, 68 Ill. 588, where, unless the court interposed, the trust property would be lost, and after citing *Curtiss v. Brown*, the general principle was announced that in cases of urgent necessity the trust might be broken in upon, to the perversion and change of the condition imposed by the trust."

In *Hale v. Hale*, 146 Ill. 227, a bill was filed by trustees asking authority to sell real estate in Cook county which the trustees under the will creating the trust had no power to sell, thereby breaking in upon the terms and limitations of the trust. A decree was entered in conformity with the prayer of the bill, and was sustained by the Supreme Court

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in an elaborate opinion. The Supreme Court affirmed the decree, citing with approval the case of *Curtiss v. Brown*, *supra*, *Dodge v. Cole*, *supra*, and *Longworth v. Riggs*, *supra*.

OPINION PER CURIAM.

The appeal in this case is prosecuted by the guardian *ad litem* of infant defendants from a decree authorizing the trustee under the will of Francis C. Sherman, deceased, to lease the trust estate for a term of ninety-nine years, notwithstanding a provision contained in the will that no lease should be for a longer term than ten years. The facts established by the evidence show that it is for the interest of all the beneficiaries under this trust that the decree should stand, and that without such decree a trust estate of more than a million of dollars will be practically unproductive and the children of the testator, the primary object of his bounty, will be deprived of the income which he intended they should receive. The children, grandchildren and great-grandchildren of the testator are parties to this suit, and his children and grandchildren are all adults and consent to the entry of the decree. The great-grandchildren have only a contingent interest in the trust estate, dependent upon their surviving and their parents being dead at the date of the termination of the trust.

No question is made, nor could any be made upon the evidence in this case, as to the sufficiency of the evidence to justify the decree, if a court of chancery has the power to grant the relief given in this case by the decree. The trustee has the title of the trust estate, with the power to lease for a term not exceeding ten years. The effect of the decree is to do away with the limitation as to the duration of the lease which the trustee may make upon the terms provided in the decree. It seems to us that in view of the decisions of the Supreme Court of this State the question is not an open one. In the case of *Curtiss v. Brown*, 29 Ill. 201, the court said:

“Exigencies often arise not contemplated by the party

creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated, had he anticipated the emergency."

In the case of *Voris v. Sloan*, 68 Ill. 588, it was held that a court of chancery has power to break in upon the terms of a trust and to change the terms and conditions imposed by the person creating it in extreme cases. The same doctrine was held in the recent case of *Hale v. Hale*, 146 Ill. 227, in which a decree authorizing a trustee to sell real estate where the will creating the trust gave no power of sale was sustained. In our opinion it is the settled law of this State that where necessity requires it, a court of chancery has power to change and alter the limitations and provisions covering trust estates. It being the duty of the court in such case to occupy the place of the party creating the trust, and to do with the fund what he would have dictated had he anticipated the emergency, we have no hesitation in affirming the decree in this case.

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John F. Neagle v. Henry G. Dawson et al.

1. **PRACTICE—Affirmance—Damages for Delay.**—A dismissal of an appeal is an affirmance of the judgment for the purpose of giving damages for delay, as well as a remedy upon the appeal bond.

Assessment of Damages, upon dismissal of appeal. Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the March term, 1896. Damages assessed in this court. Opinion filed March 31, 1896.

FRANK P. REYNOLDS, attorney for appellant.

WEIGLEY & EASTMAN, attorneys for appellees.

West Chicago St. Ry. Co. v. Cahill.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

On the first day of this term the appellant dismissed this appeal.

The appellees now ask damages. Sections 23 and 24, Chapter 33, "Costs," and Section 74, Chapter 110, "Practice," entitle the appellees to damages.

The dismissal of the appeal is an affirmance of the judgment of the Superior Court, for the purpose of giving damages for delay, as well as for remedy upon the appeal bond. *Garrick v. Chamberlain*, 97 Ill. 620.

Damages are awarded—ten per cent on the first \$100, and five per cent on the residue—as the appeal appears to have been only for delay.

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165s 496

West Chicago Street Ry. Co. and North Chicago Street Ry. Co. v. Annie K. Cahill.

1. COMMON CARRIER—*Duty Toward Passengers*.—It is as much the duty of a carrier of passengers to provide them with reasonably safe places to alight, as it is to carry them in safety to their stopping places.

2. NEGLIGENCE—*Things to be Considered in Determining*.—The fact of inviting a passenger to get off at a dangerous place by stopping there, and having stopped and seen such passenger alight in what must have been known to the conductor as a place full of perils, giving no warning or caution, are matters to be considered by the jury in determining the question of negligence.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellants.

DAVID J. WILE, attorney for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an action by Annie Kennedy-Cahill to recover damages for personal injuries alleged to have been sustained by reason of the joint negligence of the West Chicago Street Railroad Company and the North Chicago Street Railroad Company. The declaration alleges that on the eighteenth day of February, 1893, the plaintiff became a passenger on one of the defendant West Chicago Street Railroad Company's Halsted street cars, and that when the car reached the southern end of the viaduct at Halsted and Sixteenth streets, the defendant West Chicago Street Railroad Company's servants negligently stopped said car and invited the plaintiff to alight, and that while the plaintiff, relying upon such invitation, was attempting to alight from said car, the defendant North Chicago Street Railroad Company, by its servants, negligently ran against the plaintiff with a north-bound car, and thereby caught the plaintiff between said north-bound car and the one from which said plaintiff was attempting to alight, in consequence of which the plaintiff was crushed between the two cars. At the trial the jury returned a verdict in favor of the plaintiff, and assessed her damages at the sum of two thousand dollars. Judgment having been entered on this verdict, the defendants appeal.

No instructions to the jury were asked by the appellee, and no complaint is made because of the refusal of any that were offered in behalf of appellants. The accident happened on the Halsted street viaduct which crosses some railway tracks a little north of Sixteenth street, which street intersects the southern approach to the viaduct not far from its southern end, and the hour was between seven and eight o'clock on a winter's evening, described as being dark and stormy. The appellee was a south-bound passenger in one of the West Chicago Company's cars, and her destination was Sixteenth street.

The viaduct was about 175 feet long, and was divided into two roadways of equal width, by an iron truss running north

West Chicago St. Ry. Co. v. Cahill.

and south throughout its length. The viaduct was what a civil engineer, who testified, called a "riveted lattice-trussed bridge, or a pony bridge."

As we understand the evidence, there were trusses which separated the roadways from the sidewalks on either edge of the bridge, as well as the one that extended through it lengthwise, so that a person desiring to pass from one roadway to the other, or from either roadway to the sidewalk, must pass through or under the lattice-work of angle iron, tie rods and plates, which formed the trusses.

The height of these trusses was five feet one and one-half inches above the floor level of the bridge, of which distance ten inches was occupied by what is called the wheel guard on each side of the roadways.

These trusses were divided into panels fourteen feet and nine inches long from center to center of the upright posts which formed their ends, and in the middle of each panel there was an angle, formed by tie rods, which was seven feet and four inches in length at its base, and three feet and six inches in height from its apex to the deck of the bridge, through which a person could pass by first stepping up on the wheel guard, which lessened the height of the angle by ten inches, and then proceeding in a stooping posture.

We have thus particularly described the trusses because of the contention by appellants that appellee should have passed through them after leaving the car.

The roadways into which the viaduct was divided by the middle truss were used for general traffic as well as for street car tracks, there being usually but one track in each.

At the time in question, however, the west roadway was closed to all traffic, because of certain work being done to change the track therein so as to adapt it to cable power; and in order that the car traffic might not be suspended, an additional track for temporary use was laid in the east roadway so that cars going in both directions might pass in that roadway. South-bound cars passed on the west or old track, and north-bound cars on the temporary track.

Owing to the narrowness of the roadway, this temporary track had been laid to within a distance of forty and one-

half inches of the regular track, and it was proved that taking into account the distance that ordinary cars project beyond or overhang the track, there would be left a distance of less than a foot between the guard rails of two cars that should meet on those tracks. These tracks were operated jointly by the two appellant companies.

The appellee was bound for Sixteenth street, and when a block or two north of the viaduct, requested the conductor of the car to let her off at that street. Approaching that street, the car stopped on the viaduct, but close to where the incline downward of the southern approach to it began, and the appellee, in the presence of the conductor, who was standing upon the rear platform of the car, stepped off the car without any warning or caution from him. Before alighting she stepped to the west side of the platform, intending to get off on that side, but, finding the car close up to the truss that runs through the middle of the viaduct, she turned and got off on the other side between the track she had been riding on and the temporary track. It was then dark and stormy, and she remonstrated with the conductor for stopping to let her off in such a place, but received no reply except to the effect that he could not help it.

The appellant having so alighted from the east side of the north, or rear platform, proceeded to walk south between the tracks, and alongside of the car, towards Sixteenth street. Just as she reached the south, or front end of the car, another car drawn by three horses abreast, suddenly came upon her from the south. This last car belonged to the appellant North Side Company. There was not space for her safely to stand between the three horses abreast and the car from which she had alighted, and she was struck by one of the horses and then by the corner of the car they were hauling, and thrown against the car she had been riding in, and thereby injured.

It is insisted by appellants that the appellee should have got off on the west side of the car and passed under the lattice-work to the west roadway, where she would have been in a place of safety; and that appellee having elected to take the other course, and having got off and started to walk between

West Chicago St. Ry. Co. v. Cahill.

the tracks, she did so at her peril; that from thenceforward the peculiar duty of appellants to her as a passenger was ended, and her and their respective rights and duties were equal, and that her contributory negligence, in what afterward happened, relieved them from liability to her.

It is manifest from the description already made of the construction of the truss that it would have been a difficult thing, under the most favorable circumstances, for a woman carrying parcels in her arms, as appellee was doing, to have alighted from the west side of the car platform and crawled through or under the angle in the truss. She testified that when she started to get off on that side she found the truss close up to the car, and other evidence in the case showed that the side of the car was within but a few inches of the truss, and that it would have been a difficult thing to have walked in the dark between the car and the truss. Moreover, it was shown that the west roadway was closed up to traffic, by barricades at its ends, and under such circumstances, if it had been a much easier matter to have passed through the truss, it would not have been incumbent upon appellee to have gone in the dark upon the roadway, against the use of which such warnings existed. We do not think appellee was under any duty, under the existing conditions, to have tried to pass through the lattice of the truss.

Appellee had been accepted as a passenger, and had given notice to the conductor of the place at which she wished to alight. He knew, at the time he stopped and saw her alight, and heard her remonstrance and made his reply, that the place was a perilous one, and it was his duty to have warned her of the danger she was running (of the presence of which he had knowledge,) of meeting a car, which, coming up the grade of the approach to the viaduct, would be drawn rapidly by three horses abreast, and would occupy all the space of the roadway between his car and the truss on the east side of the viaduct.

It is as much the duty of a carrier of passengers to provide them with reasonably safe places to alight as it is to carry them in safety to their stopping-place. C. & A. R. R. Co. v. Wilson, 63 Ill. 167; C. & N. W. Ry. Co. v. Drake,

33 Ill. App. 114; *Maverick v. Eighth Ave. R. R. Co.*, 36 N. Y. 378.

Whether inviting the appellee to get off on the viaduct by stopping there, or whether having stopped and seen her alight without any warning or caution, in what must have been known to the conductor was a place full of peril to one in the dark, and whether knowing, as the driver of the approaching car did, that the other car was at a standstill and liable to be discharging passengers, he was justified in driving rapidly up alongside of the standing car, were all matters that the jury were entitled to consider in determining the question of appellants' negligence, and their finding in regard to them must be considered as final.

The point is made, but no authority is cited in support of it, that the joint verdict and judgment against the two appellants can not be sustained.

We understand the law to be that where two or more are jointly concerned in an act which produces the resulting injury, they may be sued jointly. *Teazel v. Alexander*, 58 Ill. 254; *Wabash, St. L. & P. Ry. Co. v. Shacklet*, 105 Ill. 364; *C., M. & St. P. Ry. Co. and C. & N. W. Ry. Co. v. Snyder*, 27 Ill. App. 476; same case, 128 Ill. 655.

As to the extent of the injuries received by the appellee, the jury were the best judges of the evidence upon that subject, and the amount of their verdict for \$2,000 indicates that they were not actuated by prejudice against the appellants or undue impartiality for the appellee.

There was no improper evidence received, and we see no cause for reversing the judgment. It will therefore be affirmed.

64 544
68 575

A. C. Barnett v. T. M. Baxter.

1. **GAMBLING—Options in Grain.**—A sale of grain to be delivered in the future is valid; as is also a sale in which the buyer has the option to call for the grain at any time within a month. The options prohibited are mere options to buy, by which the purchaser is under no obliga-

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tion to take the commodity at all, but may pay the difference in price, and thus be discharged.

2. *SAME—Burden of Proof.*—The burden of showing that a transaction is a gambling one is upon the party asserting it, and should be made out by testimony in chief.

3. *OPTIONS—When Valid.*—Transactions of purchase and sale of grain for future delivery are valid, and the fact that a seller has the option to deliver any time during the month for which sale is made, does not render them illegal.

Assumpsit, on dishonored check. Error to Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

STIRELL & KING, attorneys for plaintiff in error.

D. M. KIRTON, attorney for defendant in error.

Transactions of purchase and sale of grain for future delivery are valid, and the fact that seller has the option to deliver any time during the month for which sale is made does not vitiate. Authorities: Benson v. Morgan, 26 App. 22; McCormack v. Nichols, 19 App. 334; King v. Luckey, 21 App. 132; Pixley v. Boynton, 79 Ill. 351; Powell v. McCord, 121 Ill. 330; Cole v. Milmine, 58 Ill. 349; Wolcott v. Heath, 78 Ill. 433; Logan v. Musick, 81 Ill. 419; Webster v. Sturges, 7 App. 560; Ware v. Jordan, 25 App. 534; Corbett v. Underwood, 83 Ill. 324.

The options which are obnoxious, and which are intended to be condemned by the statute, are “puts” and “calls.” Pearce v. Foote, 113 Ill. 228; citing Pixley v. Boynton, 79 Ill. 351.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff in error contends that he gave his check for losses he had sustained in gambling on the Board of Trade in Chicago, and that consequently he ought not now to be compelled to make good the dishonored check.

Plaintiff in error, upon the trial, introduced evidence to sustain his contention, with the result that the jury found against him.

A sale of grain to be delivered in the future is valid; as is also a sale in which the buyer has the option to call for the grain at any time within a month. The options prohibited are mere options to buy; that is, an option under which the purchaser is under no obligation to take the commodity at all, but may pay the difference in price, and thus be discharged.

The defendant below failed to show that the transactions for losses upon which the check was given, were gambling. They were not puts, calls, or mere options to buy.

The burden of proof to show that the dealings were gambling, was upon the defendant below.

Transactions of purchase and sale of grain for future delivery are valid, and the fact that seller has the option to deliver any time during the month for which sale is made, does not render them illegal. *McCormack v. Nichols*, 19 Ill. App. 334; *King v. Luckey*, 21 Ill. App. 132; *Pixley v. Boynton*, 79 Ill. 351; *Powell v. McCord*, 121 Ill. 330; *Ware v. Jordan*, 25 Ill. App. 534; *Corbett v. Underwood*, 83 Ill. 324; *Fox v. Steever*, 55 Ill. 255.

The burden of proof that the check was given for an illegal consideration being upon the defendant below, he should have made out his case by testimony in chief, and can not complain that the court refused to permit him by cross-examination of the witnesses of the plaintiff below, to make out his case.

The witness Danforth, whom plaintiff in error sought to cross-examine as to the consideration of the check, gave in chief no testimony as to the consideration of the check; if plaintiff in error wished to examine Danforth as to the matters and things out of which the check grew, concerning which Danforth had given no testimony, plaintiff in error should, when he came to his defense, have called Danforth.

Nor was it a sufficient proof of illegality that a witness testified that the grain might have been bought at the end of an option. The question was not what might have been, but what was.

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Plaintiff in error urges that the instructions given for the plaintiff below were improper. They were unnecessary, as the letter of the defendant below and the check with proof of its dishonor, made a complete case. The omission from the first instruction, that the right to close out defendant's transactions depended upon his not having, after notice, deposited further margins as a security, was immaterial, because it is undisputed that the defendant did not put up the necessary margins; the check he gave was not good.

The instructions must be considered as a whole, and as a whole the jury were fully instructed as to what, under the circumstances, would create a valid debt; no question of law was left to them.

The testimony of plaintiff in error as to his understanding of what he was doing, was not sufficient to establish the nature of the dealings.

Plaintiff in error asked that, *mutatis mutandis*, an instruction approved in Watt v. Costello, 40 Ill. App. 307-309, be given. The court gave only the following portion thereof:

“If the jury believe from the evidence that the purchase and sales of grain involved in this suit, were intended by both Barnett and the firm of Baxter & Co., or the agent of Baxter & Co., who transacted the business, to be made as a means of gambling on the fluctuation in the market price of such grain, and that no delivery or acceptance of grain was intended, plaintiffs are not entitled to recover for any alleged losses, commissions or margins, or upon any check given therefor.”

The instruction as given was sufficient to present fully and forcibly the law applicable to the contention of the defendant below. We see no sufficient reason for reversing the finding of the jury upon the facts.

The jury was fairly instructed, and the judgment of the Circuit Court is affirmed.

64 548
166 528

West Chicago Street Railroad Co. v. Margaret Nash.

1. **CARRIERS OF PASSENGERS—Diligence Required.**—A common carrier of passengers for hire is bound to exercise the highest degree of diligence for the safety of his passengers.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

STATEMENT OF THE CASE.

This was an action by Margaret Nash to recover damages for personal injuries alleged to have been received through the negligence of the West Chicago Street Railroad Company.

The declaration, which consists of three counts, alleges, first, that the defendant failed to operate its certain grip-car, in which the plaintiff was a passenger, in a safe and steady manner, and to give the plaintiff an opportunity to be seated, but before the plaintiff could reach a seat the defendant's servants suddenly started the car, thereby throwing the plaintiff to the floor; second, that the defendant failed to perform its duty to keep the aisles or passage way in the car free from satchels, parcels or other obstructions, in consequence of which the plaintiff, on her way to a seat in the car, stumbled and fell over a satchel, parcel or other obstruction; the third count is merely a combination of the other two.

The plaintiff claims to have sustained a fracture of her left arm and other wounds and bruises, which have caused her great pain and prevented attendance upon her usual business and affairs.

The evidence shows that on the morning of November 7, 1892, the plaintiff took passage on one of the defendant's Madison street cars at the corner of Madison and La Salle streets. The train, which consisted of the grip-car and one trailer, stopped on La Salle street, just after rounding the

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curve, to let off passengers, and it was at this point that the plaintiff stepped on the rear platform of the trail-car, which was a closed one with the seats along the sides. Before she had gone very far along the aisle of the car she fell to the floor, and the cause of this fall is the issue involved in this suit.

She claims that the car started up suddenly, that she was thereby thrown and in consequence stumbled and fell over a satchel standing in the aisle; the defendant claims that the evidence shows beyond question that there was no sudden starting of the car, and that she carelessly stumbled over an umbrella carried by one of the passengers.

At the trial the jury returned a verdict in favor of the plaintiff, and assessed her damages at fifteen hundred dollars. Judgment having been entered on this verdict, the defendant appeals.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

W. D. MUNHALL, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Only a question of fact is involved in this appeal. Appellant was bound to exercise the highest degree of diligence for the safety of appellee, who was a passenger.

We find in the record no sufficient reason for reversing the conclusion of the Circuit Court, and its judgment is affirmed.

West Chicago Street R. R. Co. v. Patrick McNulty.

1. NEGLIGENCE—*Passengers on Street Cars Riding Outside.*—As a matter of law it is not necessarily negligence for a passenger on a street car to stand and ride upon the foot board, holding onto the railing, where the cars are crowded, etc.

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67	66
64	549
166	203
64	549
70	244
64	549
89	190
64	549
102	1185

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2. STREET CAR COMPANIES—*Diligence as to Persons Riding Outside.*—So long as carriers of passengers in crowded cities tolerate and encourage the practice of passengers standing and riding upon the foot boards outside of their vehicles (street cars) the rule of law which demands the highest degree of diligence on the part of the carrier must not be relaxed.

3. ORDINARY CARE—*Exercise of, by Persons in Peril.*—A person in danger is not bound to act with unerring diligence and wisdom in making his choice of which to do; it is sufficient if he does that which would ordinarily have been done under like circumstances by an ordinarily careful person.

4. QUESTIONS OF FACT—*Negligence.*—It is a question of fact for the jury whether a street car company is guilty of negligence in managing its trains, in the presence of danger known to its agents to exist from such facts as the apparent drunkenness of the driver of a wagon in the crowded street.

5. CONTRIBUTORY NEGLIGENCE—*A Question of Fact.*—The question as to whether a person at the time of receiving an injury was guilty of contributory negligence is one for the determination of the jury.

TRESPASS ON THE CASE, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

WM. DEVER and KAVANAGH & O'DONNELL, attorneys for appellee.

It is not negligence even for a person to sit down or stand up and ride upon the steps of a steam railway car where the danger is infinitely greater than upon a cable car. C. & A. R. R. v. Fisher, 38 Ill. App. 33.

Nor for a passenger to ride, in some cases, upon the foot-board of a locomotive engine. L. S. & M. S. R. R. v. Brown, 123 Ill. 173.

A passenger does not owe a duty to the railroad company to push and crowd his way in order to get an advantage over other persons within the car, and it does not follow, as a matter of law, that he is guilty of negligence for not so doing. C. & A. R. R. v. Fisher, 141 Ill. 614.

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It is not negligence for a passenger to stand upon the platform or foot-board of a street car. *Meesel v. Railroad Co.*, 8 Allen (Mass.) 234; *Railway v. Waling*, 97 Pa. St. 55; see also *Burns v. The Railway Co.*, 50 Mo. 319; *Maguire v. Middlesex Railroad Co.*, 115 Mass. 239; *Clark v. Railroad*, 36 N. Y. 135; *Railroad v. Ranz*, 55 Ga. 126; *Railway v. Boubrou*, 92 Pa. St. 476; *Railroad Co. v. Wilson*, *Montreal L. R.*, 5 Q. B. 340; 23 Am. and Eng. Ency. of Law, 1005.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The amended declaration filed in this cause consisted of four counts, and alleged: First, that on the 5th day of July, 1892, the plaintiff (appellee) became a passenger on one of the defendant's Milwaukee avenue cable cars, and that while he was in the exercise of due care and diligence for his safety, the car upon which he was riding was, by reason of the negligence of the defendant's servants, caused to collide with a certain wagon or vehicle, whereby the plaintiff was struck and thrown with great violence from the car. Second, that the defendant's servants negligently failed to notify and warn the plaintiff of the danger and proximity of the wagon. Third, that the defendant's servants negligently failed to manage and control said cars so as to prevent a collision, and carelessly continued to operate said train at a great rate of speed. Fourth, that the defendant negligently allowed the plaintiff to be thrown on the pavement of the street and dragged a great distance.

At the trial the jury returned a verdict in favor of the plaintiff and assessed his damages at the sum of twenty-five hundred dollars.

This appeal questions the correctness of the judgment entered upon such verdict.

There appears to be no dispute about the fact that from the time the appellee boarded the car until the accident happened, he stood and rode upon the foot-board that ran lengthwise upon the right-hand side, in the direction it was moving, of an open car, and that he so stood and rode for a distance of about four blocks. The train was composed of

two cars called trailers, and a grip car, and appellee was standing on the foot-board and toward the rear end of one of the trailers.

In the course of moving along the train overtook a team and wagon going in the same direction, and driven, as the gripman testified, by one who seemed to be intoxicated, and who kept zigzagging in and out of the track just ahead of the train.

Finally, the wagon pulled out, and as the train was passing, the hub of one of the wagon wheels scraped along the foot-board, and the appellee was struck by it and injured.

One of his legs was broken, and he received other injuries.

There was evidence that other wagons were standing near the street curb, and that there was not space enough between them and the train for the wagon in question to be got out of the way of the cars; and there is other evidence from which it might be inferred that because of the driver's drunkenness or carelessness, he heedlessly swung his wagon against the moving train.

There was evidence that the train was crowded, that all the seats were occupied, and that the aisles between the seats and the platforms were crowded. Appellee testified that he saw the car was crowded. If there was a safe position on the car for him to stand, nobody in charge of the train pointed it out or suggested it to him, and it is plain from his testimony that he did not know of any such place.

We may not say that, as a matter of law, for a passenger to ride in the place appellee did, and that he stood there facing the inside of the car and holding to the railing, was negligence. C. W. D. Ry. Co. v. Klauber, 9 Ill. App. 613.

So long as passenger carriers in a crowded city tolerate and encourage such methods of transportation of persons, the rule of law which demands the highest degree of diligence on the part of the carrier must not be relaxed.

The evidence on the part of appellant was, that the train was moving four or five miles an hour when the emergency signal to stop was given, while that on the part of the appellee was that it was moving at full speed.

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It is difficult to understand how, even with the train moving at the lowest speed testified to, a person standing upon the foot-board could have jumped off with safety in the presence of a wagon crowding against the train. It is probable from the evidence, that appellee did not see the peril he was in until he heard some one call out to "look out," and it seems to be certain that he was struck at about the same instant of time.

Counsel for appellant say, "If he had attended to his safety with ordinary prudence, he would have been able to avoid the injury as the other passengers did." The record does not disclose what was done by other passengers, nor does counsel say what appellee should have done. But though with nothing before us except the description of the occurrence, we might see ways to avoid what did happen to appellee, he was not bound to act with unerring diligence and wisdom in making his choice of what to do. All that was required of him to do was that which would ordinarily be done under like circumstances by an ordinarily careful person. The instinct of self-preservation will ordinarily prompt one in danger to act quickly and in his best judgment at the moment, but it is not required as a matter of law that he should make no mistake in what he does when so confronted.

At one time and under one set of circumstances, it might as matter of fact be more prudent for a passenger to jump from a moving car than to remain on it, but the law imposes no duty one way or the other about it. What is or is not negligence, is always a question of fact under all the surroundings of the situation.

And so here, it was a question of fact for the jury to determine whether the appellee himself was guilty of contributory negligence, either in riding where he did, or in his conduct after the peril became known to him.

And so it was also a question of fact for the jury, whether the appellant negligently managed its train in the presence of the danger known to its agents to exist from the apparent drunkenness of the driver of the wagon, and in the crowded condition of the street.

The appellee had the right to assume that the train would be so managed as to make it safe for him to stay on it even though he had noticed the circumstance of the peculiar driving of the team. That was a matter the gripman had full observance of, and it behooved him in the proper discharge of his duty to so manage the train as that the wagon should be passed in safety to the passengers. Whether the train was managed negligently or not, and whether the appellee was guilty of contributory negligence or not, were questions that the jury decided adversely to the appellant, and which we can not review.

Fault is found with the following instruction, given at the request of appellee:

“The court instructs the jury, the plaintiff as a passenger was not required by law to exercise extraordinary care or manifest the highest degree of prudence to avoid injury. All the law required of him, while traveling as a passenger, was that he should exercise ordinary care and prudence for his safety, such as ordinarily careful persons would exercise under the same circumstances as those shown in the evidence.”

And it is said that the two clauses of the instruction are in conflict with each other.

We do not so regard the instruction. It is the law that a passenger is not required to exercise extraordinary care for his own safety, and that all that is required of him is that he should exercise such ordinary care and prudence as ordinarily prudent persons would exercise under like conditions.

We regard the form as fully justified by what is said in C. & A. R. R. Co. v. Fisher, 141 Ill. 614 (p. 624). The appellant requested the following instruction, and because the court struck out the portion that is italicized, it is claimed that reversible error was committed.

“10. The jury are instructed as a matter of law that ordinary care and prudence is the exercise of that care which every person of common prudence bestows upon his affairs and concerns, *and a person of ordinary prudence bestows the*

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highest degree of vigilance and care upon his own affairs when danger surrounds him, or he apprehends impending disaster. The plaintiff was bound to exercise that degree of care, and if by that degree of care on his part the accident might have been avoided, the plaintiff can not recover in this case."

The instruction as requested asked too much. There was no evidence that the appellee had reason to apprehend disaster to himself until the very instant he was struck by the wagon. And as we have already seen, he was not called upon under such circumstances to do more than would be ordinarily done by an ordinarily prudent person under the same conditions as surrounded him.

The alleged error in modifying the special interrogatory that was submitted to the jury does not appear to us to be well founded. If needed to be given at all, the interrogatory should have been modified as was done, so as to present to the jury a question that was involved in the case. The question was not whether the appellee might not have removed himself from the car, but was, being there, could he have avoided the injury by ordinary prudence.

As to the amount of damages, the jury heard the evidence as to the extent of appellee's injuries, and seem to have exercised reasonable judgment in the award that was made. We find no material error in the record, and the judgment is affirmed.

The Hammill Fire Escape Company v. John Davis et al.

1. **APPELLATE COURT PRACTICE—*What the Abstract Must Show.***—Where the trial judge hears the witnesses, and denies a motion for a new trial, the burden is upon the unsuccessful party to show by his abstract of the record that the ruling of the trial judge was wrong.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

WEIGLEY & EASTMAN, attorneys for appellant.

McMURDY & JOB, attorneys for appellees.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

These parties during the years 1886-7-8, were in such relations with each other that, as the brief of the appellant states it, "the two businesses were consolidated."

The abstract of the pleadings is "declaration, *narr.* and common counts;" "plea of non assumpsit;" and we infer that the appellees sued the appellant in assumpsit. But we are not informed by the abstract what the appellees claimed.

The abstract does state, "36-44," books offered in evidence as to the entries testified to by witness, except as to the price. We understand "36-44" to refer to nine consecutive pages of the record.

Not an exception as to admission or rejection of evidence or giving or refusing instructions is alluded to in the brief of the appellant, except by way of recital, and no complaint is made of anything in those particulars.

The whole complaint is that the court did not grant a new trial because of insufficient evidence to justify the verdict, varied a little by a statement that part of the verdict is contrary to the instructions of the court.

To determine whether that complaint is well founded, we are expected to review one hundred and fourteen record pages of oral testimony, without knowledge of the contents of nine record pages of evidence from books. Any conclusion we might reach would be as likely to be wrong as right. The dealings through the years mentioned were many; including a good deal of exchanging of checks. The circuit judge, fresh from hearing the witnesses through a three days trial, denied the motion for a new trial, and from the abstract we can not tell whether he was right or wrong. We can not know what items were claimed by the appellees. There is no bill of particulars, and what the books may have proved is not shown.

Ferry v. Miltimore.

The principal contest seems to have been about an item of \$1,000 for patterns which was the subject of much conflicting and irreconcilable testimony. It was for the jury to say which was true. The rest of the verdict seems to have been for what was shown by the books, and to have been contrary to the instruction of the court as to the sufficiency of the proof; but if the court, on motion for a new trial, was convinced that the jury took a more correct view, the motion for a new trial was properly denied. Koerper v. Jung, 38 Ill. App. 144; King v. Poole, Cases Temp. Harwd. 23; Van Vacter v. Brewster, 1 S. & M. (Miss.) 400.

The judgment is affirmed.

Charles H. Ferry v. George W. Miltimore et al.

Chicago Tire and Spring Works v. Same.

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105	329

1. **CONTRACTS—*Construction of*.**—The meaning of an agreement is to be found in its words, and read in the light of surrounding circumstances.

2. **EQUITY PRACTICE—*No Affirmative Relief on an Answer.***—Affirmative relief in chancery can not be given upon an answer.

3. **SAME—*Adjusting Accounts.***—Courts will not waste their time in adjusting the particulars of a long and intricate account—a business which is the peculiar province of a commissioner and accountant.

Bill to Adjust an Account.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded with directions. Opinion filed June 11, 1896.

GREEN, ROBBINS & HONORE, attorneys for appellants.

PEOK, MILLER & STAAB, attorneys for appellees.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Miltimore was the chief man of, and gave name to, the Miltimore Elastic Steel Car Wheel Company, a manufacturing corporation in Vermont.

The dealings which are the subject of controversy here begun, as shown in a document, are as follows:

“CHICAGO, March 23, 1883.

The Chicago Tire & Spring Works,

DEAR SIRS: We hereby agree to purchase from you the undermentioned car wheel tires, viz.:

100 Tires 30 in. outside dia., $2\frac{1}{4}$ in. thick.

600 “ 33 “ “ “ $2\frac{1}{4}$ “ “

300 “ 42 “ “ “ $2\frac{1}{4}$ “ “

Price $5\frac{1}{2}$ cts. per lb. f. o. b. Chicago.

Terms cash 30 days.

Delivered in lots as required on or before the 1st day of January, 1884. You have the option of delivering double the quantity and in above proportion at same price and terms.

THE MILTIMORE ELASTIC STEEL CAR WHEEL Co.,

O. B. 52.

By H. PENNOCK, President.

53 Dearborn St.”

On the back as follows:

“Blooms to be of Cammel Manfgr. & Siemens-Martin Steel.

F. M. ATKINSON, Prest.”

Atkinson was president of the Tire Company. Twelve hundred and twenty-eight tires were delivered. A large part of them were made of steel inferior to the kind specified. Quarrels arose between the parties about many things —other dealings, as well as the tires. Ferry was largely interested in the tire company, and also had individual dealings with the appellees.

Miltimore, in August, 1884, wrote to his own employe that “in the first place there is something radically wrong with their tires. We are having them tested. Farnum says they are nothing but high carbon Bessemer steel which we can buy delivered N. Y. for $3\frac{1}{2}$ per pound. * * * My opinion is about one-half of these tires are Bessemer; the other half is open hearth. We have been turning all of these, tires, and we find a part of them very short; the chip breaks off short, showing the metal is lacking of tenacious qualities; the other half turned up like Midvale tire, long chips, tough and hard.”

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And in December, 1884, in an affidavit, he stated that the tires were of an inferior quality, and of poor metal, and gave very small mileage, and were inferior to any open hearth tire in use * * * and of much poorer quality than said tire works promised and agreed;" with much other depreciation of the quality of the tires.

Litigation was pending between the parties.

In this condition of affairs an agreement consisting of thirteen articles, and occupying here nearly six printed pages of the abstract, was made January 12, 1885, portions of which are as follows:

"Memorandum of agreement, entered into between Charles H. Ferry, party of the first part, The Chicago Tire and Spring Works, party of the second part, The Miltimore Elastic Steel Car Wheel Company, party of the third part, and George W. Miltimore, party of the fourth part.

WHEREAS, the above parties are desirous of settling all suits and differences now existing between them, it is now mutually agreed between them as follows:

II. An accounting shall be taken of the steel tires actually delivered by the party of the second part to the party of the third part, under contracts executed on or about the 23d day of March, 1893, including 508 33-inch tires hitherto delivered at Garfield, Illinois, which tires shall be surrendered by the party of the second part to the party of the fourth part f. o. b. Chicago, free from all liens and charges, except the necessary charges of handling and storing the same. Also 176 42-inch tires manufactured but not delivered, which shall be delivered by the party of the second part to the party of the fourth part, free from all liens and charges, f. o. b. Chicago.

Interest shall be added to the purchase price of the tires delivered at seven per cent per annum, commencing to run thirty days after date of delivery.

IX. It is agreed that the party of the fourth part, the party of the third part, or any corporation which shall become its successor and carry on the business of the party of the fourth part, shall purchase and take when manufactured

into tires the balance of the blooms purchased and held by the party of the second part, for the purpose of carrying out the contracts entered into on or about the 23d day of March, 1883, between the party of the second part and party of the third part, in such quantities and at such times as the business of said party of the fourth part and party of the third part, or its successor, shall demand; and it is agreed that no other tires shall be used in said business unless specially directed by purchasers of wheels. If any specifications shall be made by purchasers of wheels for other makes of tires, the party of the second part shall be notified thereof and given ample opportunity of arranging with such purchasers for the use of tires manufactured out of said blooms.

VII. If any tires furnished by the party of the second part to the party of the third part or the party of the fourth part shall prove defective in manufacture or quality of material, the party of the second part agrees to make good any expense or loss necessarily incurred by the party of the fourth part in remedying defects in the manufacture of any such tires, and to save harmless the party of the third part and party of the fourth part from any claims made by the purchasers of wheels on account of defects in the material or manufacture of such tires."

I transpose articles 7 and 9, as the order seems to me more appropriate.

Now the main question between these parties is whether the whole remedy of the appellees for defects in the tires is under article 7, and limited by the words of that article.

We lay out of view the construction placed by the appellees upon some testimony by Ferry as to the object and meaning of the agreement, as well as all prior negotiations.

The meaning of the agreement is to be found in its words, read in the light of surrounding circumstances. *Davis v. Sexton*, 35 Ill. App. 407; *Smith v. Brown*, 5 Gilm. 309; *Benjamin v. McConnel*, 4 Gilm. 536.

It is clear that the parties intended that the agreement

Ferry v. Miltimore.

should embrace the whole subject of their relations to each other; they were “settling all suits and differences” between them.

Miltimore knew there were defects in the steel; yet he agrees that he and his corporation—and he seems absolutely to control it—or any successor to it, shall purchase and take the tires that might be made of the steel on hand; and to secure himself and his corporation against loss, he took the agreement of Ferry and his corporation to make good any expense “necessarily incurred in remedying defects in the manufacture,” * * * “and to save harmless” against claims by purchasers for “defects in the material or manufacture.”

Provided no expense was incurred in remedying defects in manufacture, and appellees were not damnified by claims of purchasers for defects in material or manufacture, he showed no anxiety or care as to the intrinsic quality of the tires themselves.

The tires were to be sold on wheels. If they could be put on the wheels without extra expense, and the purchasers did not complain, how well the wheels wore did not concern him, and it seems did not concern Ferry either. They were equally indifferent.

This being the case, the appellants should be charged only with such expense actually incurred, and claims of purchasers sustained.

And all the tires “furnished” from the beginning of the dealings come under the same provisions as to expense and claims.

“Furnished” by itself is ambiguous. Alone it is elliptical. The auxiliary verb must be understood; and as some of the tires were in use on wheels—many had been delivered, but not yet on wheels, some already made, not yet delivered, and others to be made—there was the same reason for extending the provisions to the past as to the future, and *vice versa*. The meaning is, “if any tires” which have been or may be “furnished.”

The court below acted upon these principles as to the

1,228 tires delivered before the agreement was made, but, as to the tires mentioned in article two of the agreement, held that they were not such as should have been delivered, and that therefore the appellees should not be charged with them, and should be credited with freight paid on them. If the agreement was made under any mistake of fact as to the quality of the tires mentioned in article two, the bill filed by Miltimore should not have been—as this was—for relief under the agreement. The bill contains no allusion to the terms under which dealings began, no reference to the document of March 23, 1883, and yet the decree, if it has any basis as to the tires mentioned in article two, must be on the theory that the guaranty implied by the words on the back of that document remained in force, notwithstanding the full settlement of "all suits and differences between them," and regardless of the fact that the Wheel Company was, at the time the agreement was made, alleging the inferior quality of the tires as the cause of action in one suit, and of defense in another.

This bill was filed October 25, 1886, and there was no allusion in any pleading in the case to the original document, "23 March, 1883," until May 11, 1888, and then only in an answer to a cross-bill of Ferry. Relief can not be given on an answer. *King v. Cooper*, 134 Ill. 183.

The decree is reversed and the cause remanded, with directions to the Circuit Court that an account be stated anew, in which account the appellants shall be allowed the purchase price of all tires delivered, and charged only in accordance with the words of article seven.

No other objections to the decree are argued, and if there were, we are not in duty bound to go through items in an account. When the State of Virginia contained something like three-fourths as many people as are now in Cook county, with possibly not one-fourth as much business in the Court of Appeals of that State as now comes to this court, that court said of themselves: "Without wasting their time in adjusting the particulars of a long and intricate account—a business which is the peculiar province

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of a commissioner and accountant—and which, if this court were to admit themselves to be bound to engage in, would in a year or two put a total stop to the administration of justice in civil causes in this commonwealth." *Perkins v. Saunders*, 2 Hen. & Mun. 420. Reversed and remanded, with directions.

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Henry Llewellyn v. Caroline M. Dingee, Widow and Administratrix of the Estate of Henry A. Dingee, Deceased, et al.

1. **LACHES—*In Suits to Restore Lost Records.***—Where a party to a proceeding to restore lost records whose petition was dismissed, under a general order of court for want of prosecution, waited fifteen years before asking to have the case redocketed, he was held to be guilty of laches.

Petition to Restore Records.—Appeal from the Circuit Court of Cook County; the Hon. **ELBRIDGE HANKEY**, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

BULKLEY, GRAY & MORE, and **ALFRED MOORE**, attorneys for appellant, contended that every court of general jurisdiction has inherent power to supply its own lost or defaced records, citing *Goetz v. Koehler*, 20 Ill. App. 234; *Douglas v. Yallop*, 2 Bur. 722; *Jackson v. Hammond*, 1 Caine's Cases, 496; *Deshong v. Cain*, 1 Duva, 309; *McLendon v. Jones*, 8 Ala. 298; *Doswell v. Stewart*, 11 Id. 629; *Adkinson v. Keel*, 25 Id. 551; *Pruitt v. Pruitt*, 43 Id. 73; *Pierce v. Thackery*, 13 Fla. 574; *Fisher v. Sievres*, 65 Ill. 99; *Freeman on Judgments*, Sec. 89.

The papers of a case when filed under our statute become a part of the record as fully as if copied into the record book of the court. *Stevison v. Earnest*, 80 Ill. 517.

The destruction of the record by fire has no effect upon the constructive notice existing by virtue of such record. *Franklin Savings Bank Co. v. Taylor*, 131 Ill. 386; *Shannon*

et al. v. Hall, 72 Ill. 354; Curyea et al. v. Berry et al., 84 Ill. 600.

A decree dismissing a cause for want of prosecution is no bar to the prosecution of a similar proceeding. Story's Equity Pleadings, Sec. 793, note A and 4; 1 Daniell's Chancery Plead. & Pract. (5th Ed.), 811, n. 4; Foot v. Gibbs, 1 Gray, 412; House v. Mullen, 22 Wall. 42.

When a bill is dismissed for want of prosecution it operates as a discontinuance and is more than a non-suit at law, and does not prevent the bringing of a new bill. McBroom v. Summerville, 2 Stew. 215; Potter v. Vaughan, 26 Vt. 224.

Dismissal without prejudice is no bar to another suit. House v. Mullen, 22 Wall. 42.

A record when lost or destroyed may be proven like any other writing, by secondary evidence. Gage et al. v. Schroeder, 73 Ill. 44.

The best evidence of which the nature of a case is susceptible must be produced if in the power of the party seeking to use it, and where the highest evidence can not be had then resort may be had to the next highest, or secondary evidence. Ellis et al. v. Huff, 29 Ill. 449; Cornett v. Williams, 20 Wall. 246; Hedrick v. Hughes, 15 Wall. 131; Renner v. Bank of Columbia, 9 Wheat. 598; Beveridge v. Chetlain, 1 Ill. App. 231.

No evidence is necessary where the defendant admits the allegations of the petition by demurring to it. Jackson v. Glos, 144 Ill. 21.

KNIGHT & BROWN, attorneys for appellees Dingee et al.

It is the duty of a party to be present when his case is reached for trial, and if he is not and the case is dismissed he must take the consequences. Cleaver v. Smith, 114 Ill. 114.

It is the settled law in this State that actions to subject real estate to the payment of a deceased's debts are barred in seven years. Wolf v. Ogden, 66 Ill. 224; Breit v. Yeaton, 101 Ill. 242.

The record if restored at all must be restored as to all

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parties in interest and should not be restored as to *bona fide* purchasers.

The first petition to restore the record was filed by the petitioner June 14, 1880, nine years after the alleged record was destroyed by the great Chicago fire in 1871. This petition after pending on the docket for seven years was dismissed upon a trial call, July 12, 1887, and the present petition to restore files, was filed by the petitioner April 21, 1888.

It is shown by the testimony that of the property owned by the Dingees and Westerfields in 1880, forty per cent was sold prior to the filing of the present petition, and that about 100 persons who were record owners of property involved in this litigation at the time of the filing of the present petition are not made parties to this proceeding.

If, however, this record is restored it must be restored as to all the parties in interest. The record if restored as prayed will cloud the title of these persons, who purchased portions of the premises in question from 1880, and prior to April 21, 1888.

It is contended that these persons are not chargeable with notice of *lis pendens*, and that the record should not be restored as against them.

In the case of *Herrington et al. v. McCollum*, 73 Ill. 477, it is said :

“If a suit were not prosecuted with effect, as if at law it were discontinued or the plaintiff suffered non-suit, or if in chancery the suit were dismissed for want of prosecution or for any other cause not on the merits, or if at law or in chancery any suit abated, although in all such cases a new action could be brought, it could not affect a purchaser during the pendency of the first suit.” See also *Newman v. Chapman*, 2 Rand. 93; *Watson v. Wilson*, 2 Dana, 408; *Herrington v. Herrington*, 27 Mo. 560.

Still less could a purchaser after the dismissal and before the revival of the suit in such cases be affected. *Price v. White*, 1 Bailey’s Eq. 234; *Blake v. Hayward*, Id. 208; *Turner v. Crebill*, 1 Ohio, 373.

If the order dismissing the suit had expressed that it was

without prejudice, a different rule might obtain, although even that is questioned by respectable authority. *Clarkson v. Morgan*, 6 B. Mon. 441.

To affect purchasers there must be a close and continuous prosecution of the suit, the exercise of a reasonable diligence, unaccompanied with any gross slips or irregularities, by which injury could accrue to the rights of third parties. *Preston v. Tubbins*, 1 Vt. 286; *Clarkson v. Morgan*, 6 B. Mon. 441; *Watson v. Wilson*, 2 Dana 408; *Gibler v. Trimble*, 14 Ohio 323; *Trimble v. Boothy*, *Id.* 109; *Ehrman v. Kendrick*, 1 Metc. (Ky.) 146.

"If to permit a case to remain off docket for two entire years during four regular terms of court without making any effort to reinstate it and have a hearing can be called the exercise of reasonable diligence, or, indeed, any degree of diligence whatever, it would be difficult to determine what might be regarded as laches in the prosecution of a suit."

To the same effect is *Durand v. Ford*, 115 Ill. 610.

JESSE A. & HENRY R. BALDWIN, attorneys for appellees
Westerfield et al.

Laches has been defined to be such neglect or omission to assert a right, as, taken in conjunction with lapse of time more or less great, and other circumstances causing prejudice to any adverse party, operates as a bar in a court of equity. *Morse v. Seibold et al.*, 147 Ill. 325; 12 Am. & Eng. Ency. of Law, 533.

The delay or laches in equity does not in all cases conform to the statute, while equity as a general rule will give effect to the statute of limitations. It goes further in the promotion of justice and holds that to be laches in many cases where there will be no bar to an action at law. There are numerous cases in this court where the doctrine of delay has been applied to defeat the relief sought, where the statutory period had not run. In some cases two years delay has been held to bar relief. Where there is such a change in the relations of the parties, or such a change in the sub-

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ject-matter of the suit as to render it inequitable to grant relief, it will be refused without reference to the statutory period, or where the delay is so great in asserting the right as to create the presumption that complainant had abandoned his claim, relief will be denied. *Walker v. Ray*, 111 Ill. 322. See also *Hatch v. Kizer*, 140 Ill. 583; *Fry on Specific Per.* 218; *Hough v. Coughlan et al.*, 41 Ill. 134; *Sebring's Adm'r v. Adm'r of Sebring*, 4 N. J. Eq. 49.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a petition filed April 21, 1888, by the appellant, to restore the files and records in a certain chancery cause, and to redocket the same, wherein he was complainant, begun in the Circuit Court on April 22, 1871, for the purpose of setting aside a certain decree of partition entered in said court in the year 1861, which files and records were destroyed in the great fire of October, 1871.

It is set up in the petition that the petitioner filed his petition of similar purport and effect on June 14, 1880, and that said petition was pending from that date until July 12, 1887, when the same was dismissed for want of prosecution.

The petition was verified, and attached to it were certain exhibits claimed to be respectively substantial reproductions of the said bill in equity, an answer by all of the defendants named in the bill, and a general replication to the answer.

The petition was answered by the parties made defendants thereto, and a hearing being had upon the issues joined, the petition was dismissed for want of equity, and this appeal is prosecuted therefrom.

The decree dismissing the petition was proper.

The suit sought to be restored and redocketed was dismissed by a general order of the Circuit Court entered April 8, 1873, in pursuance of an order entered in said court on February 1, 1873, as follows:

“It is hereby ordered that all chancery causes pending upon the docket of the Circuit Court previous to the fire of

October 9, 1871, be redocketed, and the files or petitions or copy thereof be restored by the parties interested to the files of said court on or before the first Monday of April, next. In default of such redocketing and restoration any and all cases pending prior to the said fire will be dismissed by an order of the court for want of prosecution on said day or as soon thereafter as may be convenient."

From that time until June 14, 1880, no step whatever was taken by the petitioner to restore the files and redocket the cause. The reasons set up for this long delay are wholly insufficient to justify it. They are in effect nothing more than might be said to have applied with greater or less force to every party to litigation in this county in those years.

And from June 14, 1880, when the first petition was filed, down to the date of its dismissal for want of prosecution on July 12, 1887, and from the date of that dismissal down to April 21, 1888, when the petition in question was filed, the excuses that are set up in explanation of the delay tend strongly to convict the petitioner of being more concerned in producing delay than he was in speeding the cause.

It was made to appear on the hearing, that since 1873, and prior to 1888, the village of Wilmette has grown upon and about the property involved, and that at least one hundred and twenty-five houses have been erected upon the particular land, and more than one hundred separate persons, not parties to the proceeding, have become owners of the land involved, during the period of petitioner's delay.

It thus appears there has not only been delay by the petitioner, but that injury to others because of it would ensue if it were excused.

The law concerning laches under the circumstances of this record, is too familiar to require more than the citation of a few of the later cases. *Walker v. Ray*, 111 Ill. 315; *Speck v. Pullman*, 121 Ill. 33; *Hatch v. Kizer*, 140 Ill. 583; *Morse v. Seibold*, 147 Ill. 318.

Although we decide only, that the decree was right because of the inexcusable laches of the petitioner, it must not

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be understood that we regard laches as the only ground of bar to the petitioner, and that the decree might not be justified upon other grounds also.

We will not, however, take time to discuss the other questions.

The decree of the Circuit Court is accordingly affirmed.

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James G. Cozzens v. Chicago Hydraulic-Press Brick Co.

1. **FOREIGN CORPORATIONS—*Proof of Organization.***—A certified copy of the law of the State under which a corporation is formed, together with certificates of the proper officers, showing that the law has been complied with, is sufficient evidence of the legal organization of such corporation, in the absence of specific objections pointing out defects.

2. **VERDICTS—*Upon Conflicting Evidence.***—A verdict upon conflicting testimony is conclusive.

Assumpsit, on a contract of guaranty. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

JOSIAH BURNHAM, attorney for appellant.

MATTHEWS & HUGHES, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action by the appellee against the appellant as guarantor of a promissory note. The defense is wholly upon technicalities.

Nul tel corporation was pleaded. To prove the fact of incorporation, the appellee put in part of a statute of Missouri, which provides: "Section 2492. Articles of Incorporation—When and where filed—Shall be evidence, when. Whenever a corporation shall be organized under the laws of this State, it shall be the duty of the officers of said cor-

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poration to file with the secretary of state a copy of the articles of association or incorporation, and the corporate existence of such corporation shall date from the time of filing said copy of such articles; and a certificate by the secretary of state under the seal of the State, that said corporation has become duly organized, shall be taken by all courts of this State as evidence of the corporate existence of such corporation. A certified copy of said certificate of the secretary of state shall be filed and recorded in the office of the recorder of deeds of the county in which the organization is organized."

With that section the appellee put in such a certificate of the secretary of state of Missouri, as the section mentions, and a certificate of the recorder of deeds of the city of St. Louis that a certified copy of the secretary's certificate was recorded in this office.

The only objection made in the brief to the sufficiency of this proof is as follows: "Appellee did not prove what the requirements of the Missouri laws were, nor that it had complied with such requirements in its organization." Which, pointing out no defect in the proof, does not convince us that it is not sufficient.

The abstract states further proceedings thus:

"Note offered in evidence.

(Objection by defendant on the ground of erasures which show material alteration; objection overruled and exception; objected to further on the ground of variance of declaration; objection sustained; motion of plaintiff for leave to amend instanter granted.)

Motion of defendant for time to plead to amended *narr.*

Motion overruled and pleas on file ordered to stand as pleas to amended *narr.*

(Exception by defendants.)

Note then admitted in evidence and exception by defendants. Said note is as follows:

\$1,000.

CHICAGO, ILLS., Feb'y 24, 1893.

Ninety days after date we promise to pay to the order of Wheatly, Buck & Co. (account contract) one thousand dol-

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lars. Payable at American Trust & Savings Bank. Value received, with int. at seven per cent. per annum.

Corporate Seal,
Richardi Apartment House Co. } RICHARDI APARTMENT HOUSE CO.
House Co. } By J. G. COZZENS."

As from that history we learn nothing as to what—if any amendment was made, it is impossible to say that any error was committed. We suspect that in the declaration and attached copy of the note, the word "home" was where it should have been "house."

The order that the pleas on file stand, etc., was mere surplusage. *McAllister v. Ball*, 28 Ill. 210; cases there cited in brief of plaintiff in error. What the appellant excepted to is not stated.

The residue of the defense is whether there had been any erasure in, after the appellant signed, the guaranty; which was decided by the jury against the appellant upon conflicting evidence; and whether there was a consideration for the guaranty. Upon this last question the evidence warranted the conclusion that the appellee had supplied brick to the value of \$635 to a contractor who was engaged in the building of the Richardi house, and who did not pay; that more brick were needed; that the appellant was interested in the house, and was president of the house company; and that to induce the appellee to furnish—as it did—more brick to the total amount of the note, it, with the guaranty and an indorsement by the payee to the appellee, was delivered by the appellant to the general manager of the appellee.

There is no injustice nor error in the judgment, and it is affirmed.

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[167 313]

Elizabeth A. Matthews and Henry M. Matthews, Executors of the Will of George L. Matthews v.
Samuel H. Kerfoot.

1. *REAL ESTATE—Contracts Giving Vested Interests.*—A contract in writing and for a money consideration, by the owners of land described in it, with a second party, by which such land is subdivided into lots

and improved at a joint equal expense of all parties, and sold, the second party taking sole care, charge and management of the premises, attending to the payment of taxes thereon, making sales thereof, collecting moneys to come due on such sales, etc., without fee or commission, requiring such party to advance one-half of all money "in any way expended in behalf" of the property, and making him responsible for one-half of any deficiency in the proceeds of sales to pay the owners with interest, with all advances made by them, and extending the rights and obligations to the heirs and legal representatives of the parties, gives to such party a present vested interest in the land.

Claim in Probate.—Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

MATTHEWS & HUGHES, attorneys for appellants.

JOHN P. AHRENS, attorney for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The controversy here is wholly as to the effect of a contract, as follows:

"Memorandum of an agreement made and entered into this first day of June, A. D. 1871, by and between George L. Matthews and Darius K. Cornwell, composing the firm of Matthews & Cornwell, of the city of Chicago, Cook county, Illinois, of the first part, and Samuel H. Kerfoot, of the same place, of the second part, witnesseth:

That whereas, the said Matthews & Cornwell are the owners of the southeast quarter of the southwest quarter of section twenty-five (25), in township forty (40) north, of range thirteen (13), east of the third (3d) principal meridian, in said Cook county, Illinois, subject, however, to an agreement made with the West Park Commissioners, by which the said Matthews & Cornwell were to deed the right of way over a strip of land one hundred and twenty-five (125) feet in width, running east and west along the north line of said above described land for boulevard purposes.

Be it known that, in consideration of the sum of one dollar, to the said Matthews & Cornwell in hand paid by the

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said Kerfoot, the receipt whereof is hereby acknowledged, the said Matthews & Cornwell, their heirs or assigns, agree to sell to the said Kerfoot, his heirs or assigns, an interest in said premises, on the following terms, to wit:

The parties hereto shall jointly and equally pay all taxes and assessments levied on said premises, from, since and after the first day of January, A. D. 1868, as also all costs of grading streets or other improvements made, or to be made, on said premises, by the joint consent of the parties hereto. The said Kerfoot shall take sole care, charge and management of said premises, attend to the payment of taxes thereon, make sales thereof, collect moneys to come due on such sales, and in fine, to do all that a resident and supervising agent should do, toward the profitable and advantageous management and disposal of said premises, without fee or commission.

All proceeds of sales of said premises, or parts of said premises, after the payment of taxes and cost of improvements thereon, shall go into the hands of the said Matthews & Cornwell, their heirs or assigns, until the aggregate amount of such sale shall reach the full sum of twenty-five thousand nine hundred and eighty dollars (\$25,980), with ten per cent interest thereon, from the said first day of June, A. D. 1871.

The said Matthews & Cornwell being thus fully paid by cash and securities arising from such sales, the said sum of \$25,980, with interest thereon as aforesaid, all parts of said premises then at the time of said payment remaining unsold, and all further proceeds of sales of any part of said premises remaining on hand, or to be collected after the payment to Matthews & Cornwell as above stated, shall be the joint property of, and belong to the said Matthews & Cornwell, their heirs or assigns, an equal half, and to the said Kerfoot, his heirs or assigns, an equal half.

It is expressly understood and agreed, that if at the end of two years from the said first day of June, A. D. 1871, the said Matthews & Cornwell, their heirs or assigns, shall not have been paid the said sum of twenty-five thousand nine

hundred and eighty dollars (\$25,980) with ten per cent interest as aforesaid, they shall have power to make sale of the whole or a part, as may be necessary, of said premises, on the most advantageous terms for all concerned, and out of the proceeds of such sales shall pay all taxes and assessments legally levied on said premises, and not then paid, all cost of improvements made on said premises but not paid for, and reserve to themselves the said sum of twenty-five thousand nine hundred and eighty dollars (\$25,980), with ten per cent interest as aforesaid, and divide any excess of land or proceeds, as before provided for, between said Matthews & Cornwell one-half and said Kerfoot one-half.

It being further agreed that one-half of any deficit arising from this transaction, by reason of the failure of the proceeds of sales to pay the said sum of twenty-five thousand nine hundred and eighty dollars (\$25,980), with interest as aforesaid, and any other moneys advanced by said Matthews & Cornwell for the joint account of the parties hereto in this connection, shall be paid to the said Matthews & Cornwell, their heirs or assigns, by the said Kerfoot, his heirs or assigns.

After the payment of such moneys and securities to the said Matthews & Cornwell, their heirs or assigns, as before stated, any parts of said premises then unsold, or proceeds of sales then on hand, as before stated, shall belong to the said Matthews & Cornwell, their heirs or assigns, an equal half, and to the said Kerfoot, his heirs or assigns, an equal half.

It being understood that on the full payment to said Matthews & Cornwell of the moneys as aforesaid, a conveyance by special warranty deed, with full dower right therein will be made by them to said Kerfoot of an equal undivided half of any portion of the land then remaining unsold, and a transfer will be made by them to said Kerfoot of one-half of said proceeds and securities then remaining on hand.

All moneys to pay taxes, make improvements, and in any way expended in behalf of said property, to be advanced at

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the time of the expenditure by said Matthews & Cornwell one-half, and said Kerfoot one-half.

It is understood and agreed that no sale of the whole or a part of the joint interests of the parties hereto in said premises shall be made within two years from the said first day of June, A. D. 1871, without the joint consent of the parties hereto.

It being understood that the rights and obligations hereunder shall extend to and be obligatory upon the heirs and legal representatives of the respective parties hereto.

In witness whereof, the said parties hereto have hereunto set their hands and seals the day and year first above written.

GEORGE L. MATTHEWS, [SEAL.]
DARIUS K. CORNWELL, [SEAL.]
SAMUEL H. KERFOOT. [SEAL.]

The case is an appeal from the Probate Court to the Circuit Court from a judgment rejecting a claim presented by the appellee against the estate of George L. Matthews; the appellants being the executors of the will of George L. Matthews.

It is wholly unnecessary to go into any detail of facts beyond, or extrinsic to the contract.

The Circuit Court entered judgment in favor of the appellee for \$17,845.18. If the contract gave him a present, vested interest in the land described in it, that judgment is right; if it did not, the judgment is wholly wrong. We understand both parties to have acceded to this statement.

The contract purports to be in consideration of money paid; it requires the appellee to advance one-half of all money "in any way expended in behalf" of the property described; it makes the appellee responsible for one half of any deficiency in the proceeds of sales to pay Matthews & Cornwell \$25,980 with ten per cent interest, with all advances made by them; and it extends "the rights and obligations" "to the heirs and legal representatives" of the parties.

All these features are inconsistent with a construction that it was merely a contract for the personal services of the ap-

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peltee, to be compensated out of expected profits, and they are only consistent with the hypothesis that the land was the capital of a *quasi* partnership, out of the first proceeds of which Matthews & Cornwell were to be paid the price of the land with interest, and all their advances, and the residue of all proceeds, and of any undisposed-of land, were to be divided equally, one-half to them, and one-half to the appellee.

Little, if any, aid in construing this contract can be derived from a consideration of what courts have said in other cases; it is not probable that in making the contract the parties ever thought of litigation about it, or of what courts would think of it.

Reading the contract, as we do, as vesting in the appellee a present interest in the land, it follows that the judgment of the Circuit Court is affirmed.

64 576
168 444

North Chicago Street Railroad Co. v. Mary Gillow.

1. **APPELLATE COURT PRACTICE—Record Must Control.**—In actions for personal injuries, this court must, as in all other cases, deal with the matters presented by the record.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

STATEMENT OF THE CASE.

This was an action by Mary Gillow to recover damages for injuries alleged to have been sustained by reason of the negligence of the North Chicago Street Railroad Company.

The declaration alleges that the defendant was a passenger on one of the defendant's Chicago avenue cars on the 27th day of January, 1892; and that when the car in which the plaintiff was riding reached the corner of Chicago ave-

North Chicago St. R. R. Co. v. Gillow.

nue and Center avenue, plaintiff signaled the conductor in charge of the car to stop the same so that she might alight; that the defendant stopped its car, and while the plaintiff in the exercise of due care was attempting to alight, the defendant carelessly and wantonly started the car with a violent jerk, thereby throwing plaintiff from the said car to the ground; that in consequence she was severely bruised and internally injured, and still suffers from the effects of the said injuries, and in consequence has been unable to attend to her usual business and affairs, etc.

At the trial the jury found a verdict in favor of the plaintiff for \$3,750; on motion for new trial made by the defendant, a new trial was granted. On the second trial the jury again found a verdict in favor of the plaintiff, and assessed her damages at \$3,533. Judgment was entered on this verdict, and the defendant then moved to set aside the judgment, which motion was allowed. The defendant then moved for a new trial; whereupon the plaintiff remitted \$533, and the court having entered judgment for the balance, the defendant prosecutes this appeal.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

JOHN F. WATERS, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is true that this case, as appellant says, indicates the possibility of fraud in the presentation of claims against street railroad companies in large cities; and we might add that it seems strange that appellant received no notice of the accident until this suit was brought; we have, however, in this, as in all other cases, to deal with the matters presented by the record, and not so much with what is possible in this or any other case, as with what is probable and has been proven in the suit under consideration.

Under the circumstances, the only evidence of the ac-

cident is that brought forward by the plaintiff; this is to some degree conflicting, but not so much so as to indicate a feigned accident and injury.

Two trials having been had, appellant had ample opportunity to discover and present the truth.

Complaint is made that counsel for the plaintiff upon the trial continually asked of the plaintiff leading questions. The abstract does not show any such questions. Counsel for plaintiff was guilty of making, during the trial, an improper remark, for which he should have been censured by the court.

We fail to find in the record anything warranting a reversal of the judgment, and it is affirmed.

64	578
107	93
64	578
115	108

Fred Leiferman v. Carl Osten.

1. **DEMISE—Of Part of a Building.**—The demise of part of a building gives the lessee no estate in the land upon which the building stands.

2. **SAME—Disturbance in the Enjoyment of Easement.**—Disturbance in the enjoyment of an easement, or a deprivation of it, is not an eviction in itself, but authorizes the tenant to treat it as such by going out.

3. **AMENDMENTS—Permissible, Pending Appeals.**—Amendments are permissible in the court below, after the case is pending in this court on appeal.

4. **FORCIBLE DETAINER—Complaint in, Jurisdictional.**—Where, in an action of forcible detainer, one of the grounds of the motion for a new trial was, there was no complaint on file charging the defendant with unlawfully detaining the premises, such being the fact, the motion should have been allowed.

Forcible Detainer.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

C. E. CRUIKSHANK and FRED. H. ATWOOD, attorneys for appellant.

ALBERT MARTIN, attorney for appellee.

Leiferman v. Osten.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This case presents two questions; one as to merits, and the other as to proceedings.

The appellant was tenant to the appellee of the first story "flat," as the parties called it, of a two-story frame house at the corner of two streets.

The appellee owning the adjoining lot, without the consent of the appellant, moved the house to that adjoining lot, and the appellant refused to pay any more rent, or move out.

This action of forcible detainer was brought, and resulted in a judgment for the appellee. The position of the appellant is, that the removal of the house was an eviction by the landlord, stopped the payment of rent, and ended the relation of landlord and tenant.

That the appellant might have treated the removal of the house as an eviction, and gone out, is undisputed; but it is settled American law that a demise of part of a building gives the tenant no estate in the land upon which the building stands. 2 Taylor L. & T., Sec. 520, and cases in notes.

The tenant acquires the right of support and protection of the part demised, and enjoyment of such easements as are requisite to the use of the part demised as stairs, entrance way, and in many cases, out-houses. Payne v. Irvin, 44 Ill. App. 106; 144 Ill. 462; Keating v. Springer, 146 Ill. 481.

To constitute a portion of the premises demised the tenant must have exclusive possession. Holladay v. Chicago Arc Light & Power Co., 55 Ill. App. 463.

It necessarily follows that all that was outside of the demised flat was no part of the demise, and that whatever interest the appellant had in such outside, was as appurtenant to the flat demised. Now it is perfectly settled that disturbance in the enjoyment of an easement, or a deprivation of it, is not an eviction *per se*, but authorizes the tenant to treat it as eviction by going out; but if he won't go out, it is no eviction. Patterson v. Graham, 40 Ill. App. 399; 140 Ill. 531.

The action of forcible detainer was therefore properly brought.

The question on the proceedings arises from the fact that the justice before whom the case was commenced, and from whose judgment the appellant appealed to the Circuit Court, omitted to send up the original complaint with the other papers. There is nothing to indicate that anybody noticed the absence of the complaint until after the case was tried below; the first mention of the matter is in the motion for a new trial by the appellant.

The practice of the law requires the exercise of care as well as skill.

We find it difficult to avoid the objection that when the case was tried at the Circuit Court there was nothing to identify the subject-matter of the suit except the transcript of the justice; but the parties knew what they were litigating about.

The complaint was filed with the justice at the commencement of the suit, so that he was not without jurisdiction, as in *Stolberg v. Ohnmacht*, 50 Ill. 442. Had the absence of the complaint been made the ground of any objection at the trial, the court, as of course, would have permitted the complaint to be brought from the justice and filed, or, if lost, its place to be supplied. In fact, the complaint has been filed in the Circuit Court since the case was docketed here, and a transcript of it certified to us by the clerk of the Circuit Court. It does not appear that the Circuit Court gave leave to file it, which leave would, however, have been as of course, because the paper belonged there—by law was required to be there. The record is now complete in both courts, this and the Circuit.

Amendments are permissible below after the case is pending here. *World's Col. Ex. v. Scala*, 55 Ill. App. 207.

To send the case back for another trial, with a foregone conclusion, is a blind adherence to a "barren ideality," and the judgment is affirmed.

MR. JUSTICE WATERMAN.

This court passes only upon the record made in the court from the judgment of which the appeal is taken.

Moore Furniture Co. v. Sloane.

The appeal is from the judgment of the Circuit Court, and not from that of the justice court. In the Circuit Court, there was nothing to show that the justice court ever had jurisdiction to hear the cause or render judgment. It did not appear that any written complaint had ever been filed with the justice. Stolberg v. Ohnmacht, 50 Ill. 442; Eckels v. Wolf, 55 Ill. App. 310.

The motion for a new trial, made in the Circuit Court, called attention to the fact that there was on file no complaint charging the defendant with unlawfully detaining any premises. Such motion should have been sustained.

The error of the Circuit Court can not be corrected by filing a complaint therein, for the first time, after the term at which its judgment was rendered had expired, and after an appeal to this court had been perfected. Affirmed.

E. A. Moore Furniture Company v. W. & J. Sloane.

64	581
166s	457
64	581
72	441

1. **ERROR—Will not Always Reverse.**—Where the merits of a case are clearly with the successful party the judgment will not be reversed for unimportant errors.

Assumpsit, goods sold, etc. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

Moses, Pam & Kennedy, attorneys for appellant.

Winston & Meagher, attorneys for appellee.

On November 30, 1895, judgment for \$1,541.52 was recovered against appellant. The account sued upon was for a bill of carpets. There was a plea, claiming that the sale of merchandise, amounting to \$1,991.52, was upon a warranty that the goods were to be equal to samples exhibited to defendant; that the goods were inferior, and of no greater value than \$1,043.89; the plea was stricken out, and the defense was properly made under the general issue.

In addition to evidence of verbal promises to pay, the plaintiff introduced the following letters:

Letter of E. A. Moore Furniture Co., April 30, 1895:

"W. & J. Sloan.

GENTLEMEN: In reply to yours will say we bought the goods on open account, and as we are not making any notes, dislike very much to comply with your request. Will assure you that your bills will be paid as they become due.

Very resp.,

E. A. MOORE FURN. CO.

CHICAGO, July 17, 1895.

Messrs. W. & J. Sloan, New York.

GENTLEMEN: In reply to yours of recent date we inclose our check for two hundred fifty and no 100 dollars (\$250). We regret that collections are so very slow that we could not make it more. If you will kindly have a little patience, we will remit again in about ten days. Trusting this will be satisfactory, we are, very truly,

E. A. MOORE F. CO., W. H. F.

CHICAGO, Aug. 6, 1895.

W. & J. Sloan.

GENTLEMEN: We regret very much not being able to take care of your draft today, but collections have been so slow that it has made us a little tight in money matters. We would kindly ask you to wait till Sept. 1st and we shall be able to make a remittance. Hoping this will meet with your approval, we are, yours very resp'y,

E. A. MOORE FURN. CO.

CHICAGO, Aug. 10, 1895.

W. & J. Sloan.

GENTLEMEN: Your telegram just received and hasten to reply. We sincerely regret we are unable to comply with same, but we have been paying out just as soon as received and are short at present. We are just as anxious to meet our bills promptly as any one can be, but we have thousands of dollars due to us long past due, but things are so very slow in Chicago that it is useless for us to push our customers too hard, and thus destroy our trade. We would

Moore Furniture Co. v. Sloane.

again ask you to show a little indulgence and we will send you a remittance at as early a date as possible. Hoping this will meet your approval, we are, very respect.,

E. A. MOORE FURN. CO.

CHICAGO, September 19, 1895.

W. & J. Sloan, New York.

GENTLEMEN: In response to your telegram of the 18th would say, we have not received any letter from you recently; we did receive a draft and responded by sending check for two hundred dollars (\$200), and stated in the letter that collections were coming in very slowly and we would do the best we could. Now we would like to have your indulgence and patience. We will send you money just as fast as it comes in, which we hope will prove satisfactory. Trade seems to be picking up some lately. Thanking you for kindness shown, we are very truly,

E. A. MOORE F. CO.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT

Appellant urges that the following answer, made by one of plaintiff's witnesses, was improper: "A. That is the account then due, and is now due and unpaid."

The answer was improper, not being responsive; the objection to it should have been sustained.

There was other testimony given on the part of the plaintiff as to conversation with a man apparently in charge of defendant's premises, which should not have been admitted.

The evidence in favor of the plaintiff is so strong, the admissions of the correctness of the account and the promises of the defendant to pay too numerous, to allow it to avail itself of a claimed warranty and asserted breach; as to neither of which did the defendant say anything until six months after the purchase.

Disregarding unimportant errors, we affirm this judgment, because the merits are, as found by the jury, clearly with the appellee. Affirmed.

64 584
107 406**Pittsburgh, Cincinnati, Chicago & St. Louis Railway
Co. v. Henry Warren.**

1. **NEW TRIALS—*Misconduct of Counsel.***—Improper methods of trying causes are not tolerable, and the only corrective is for counsel to know that by such methods they imperil whatever verdicts they may obtain.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed June 11, 1896.

GEO. WILLARD, attorney for appellant.

GEORGE E. CRAMER and DUNCAN & GILBERT, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Whether the appellee has a meritorious cause of action against the appellant, or is endeavoring to perpetrate a gross fraud upon it, is a question upon which it is not improbable that the verdict of a jury, after a fair trial, would be conclusive; but not after such a trial as is shown by this record.

Among the reasons assigned by the appellant on its motion for a new trial, were these:

“ 6. The court erred in its rulings, and each of them, in respect to the kind and character of defendant’s testimony, and as to the mode, manner and order of introducing defendant’s testimony.

9. The court erred in making, in the presence and hearing of the jury, disparaging remarks concerning the defendant, its agents, witnesses and attorneys, and each of them.

10. The court erred in allowing without disapproval disparaging remarks of plaintiff’s counsel concerning the defendant, its agents, witnesses and attorneys, and each of them.”

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We shall put into this opinion only enough of the case to show the pertinency of those reasons.

Premising that Mr. Duncan was attorney for the appellee (plaintiff), and Mr. Willard for the appellant (defendant), the following is taken from the abstract.

In the opening of the case to the jury, Mr. Duncan, Mr. Willard and the court spoke as follows:

“Mr. Duncan: The history of this case has been one of continual persecution to the plaintiff. Not later than the close of last week this man was brought to Anderson, Indiana, to take the depositions of three witnesses, and after he had incurred the expense of going there and securing a local attorney to assist him, not a witness showed up, not a single soul.

Mr. Willard: I object to that statement.

The Court: Go on and make any statement you please, so far as it is not attacking the character of some person—anything you hope to prove. The objection is overruled.

Exception by defendant.

The Court: If a statement is made that can not be supported, the jury can take it into consideration after the evidence is in, but what may be said by counsel in their opening speeches, unless the character of an individual is attacked, is totally foreign to the case. I will let in everything of the kind. You can make your objections and I will rule on them.

Mr. Duncan: And I want to call your attention to a fact that will appear, not by reason of anything I say, but will appear from their own depositions now on file in this case; as a sample of how things have been conducted, a man named William Fitzgerald acted, first, as a man alleged to occupy the impartial position of commissioner in the taking of depositions, and then turned up, a week after that, as one of their own examining lawyers in the taking of depositions.

Mr. Wilson: I object.

Objection overruled; exception by defendant.

Mr. Duncan: It is proper that the jury should be placed

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in the possession of these facts, both to enable you to reach correct results in this case and upon the higher ground that no single, humble individual of any community in Illinois should be crushed by an organized aggregation of force against him.

Mr. Willard: I object.

The Court: You must not interrupt any more, Mr. Willard. You may at the termination ask me to strike out, but don't interrupt any more. Your objection is overruled.

Exception by defendant."

On the trial the following occurred:

"Deposition of B. W. Hobson read in evidence, as follows:

Direct examination by C. C. Murray.

Age forty-nine years; residence North Vernon, Jennings county, Indiana, about twelve years. Am in the undertaking business, about ten years. I know Henry Warren, the plaintiff in this cause; I have known him ever since he came to North Vernon; saw him every few days.

Q. Were you acquainted with the general reputation of Henry Warren in the neighborhood in which he lived, when he resided in the city of North Vernon, for truth and veracity? A. I was.

Q. Was that good, or bad? A. Bad.

Mr. Duncan: In this deposition, your honor, I wish to call your attention to the fact that by reason of the manner in which Mr. Fitzgerald conducted himself the plaintiff and counsel refused to have anything to do with Fitzgerald.

Mr. Willard: I object to that.

The Court: Take your exception. I can not rule on it.

Mr. Willard: I will except. I hope your honor does not intend to insinuate that we have omitted anything. I have read the entire deposition of the witness.

Mr. Duncan: Read what I called your attention to.

The Court: Read the whole of the deposition.

Mr. Willard: I have read the whole of the deposition.

The Court: Let me see the deposition.

(Deposition handed the court.)

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The Court: That certainly was not read. Read it to the jury, of course. It is part of the deposition.

Mr. Duncan: 'Thereupon the commissioner herein was given to understand and was informed by plaintiff and his counsel that they would produce no other witness to be examined on the part of the plaintiff herein, and plaintiff by his counsel notified the commissioner that plaintiff would not attend in person or by counsel in the taking of further depositions.'

The Court: That is a material part of the deposition. It was signed by the commissioner and should be read.

Mr. Willard: A little further on it will be found that notwithstanding this, the parties did come in.

The Court: When the depositions are read, they must be read as a whole.

Mr. Willard: Of course; and if I have not done it, let counsel show it. The insinuation is an unjust one.

The Court: You did not read that part.

Mr. Willard: It was no part of the witness' deposition.

The Court: You did not read that part, and it has the signature of the commissioner.

Mr. Willard: I take exception to your honor's remarks.

The Court: You may do that."

That deposition, with others on the part of the appellant, was taken before William Fitzgerald, Commissioner.

Closing argument of Mr. Duncan, on behalf of plaintiff:

* * * "You saw here the witnesses come on the stand, and come to cross-examine them in the plainest way and get hold of the truth with a pruning-hook here; it appeared to you, gentlemen, that not only was their testimony worthless, but that it was a disgrace and ridicule to put them on the witness stand.

Mr. Willard: I object.

The Court: I will stop this case in a way that will be melancholy for you, if you don't shut your mouth. You must not interrupt.

Mr. Willard: May I not object?

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The Court: Do anything you please, but no man on earth can make an argument to a jury who is interrupted, I don't care how well governed a mind he may possess. He can not make an argument to a jury, being interrupted in the course of it. (To Mr. Duncan.) You were limited to two and one-half hours, and every minute he interrupts will be credited to you to the extent of that amount of time.

Mr. Duncan: Now as to these depositions. These depositions were supposed to be taken before Fitzgerald as a man who occupied an impartial position between these parties. Is not that so? When it came to the taking of the depositions upon the part of Warren, who appeared to cross-examine this man Kutchback, and Beers? Do you remember them? Nobody but our friend Fitzgerald, the man who pretended to be the judge between these parties, and occupied the impartial position of taking these depositions, of commissioner.

To show you just exactly how this man Fitzgerald conducted this examination when it came to taking Warren's testimony, I want to call your attention to something you can not overlook; something of too much importance to be overlooked, and so I will call your attention to it. They started in at nine o'clock in the morning to take the deposition of a man named Beers, and the deposition of a man named Kutchback, simply upon two points, as to how long they knew Warren, and if, during that time, he ever shook. The examination ought to have been made in ten minutes. It was taken down in longhand and written out in longhand. Warren and his attorney went down there, and this man Fitzgerald actually and positively asked this man Kutchback, beginning at 9 A. M., August 19th (he was Warren's witness and was asked thirteen questions on direct examination), and thereupon this Fitzgerald turned in and asked him ninety-seven questions on cross-examination, all written down in longhand, and the shades of night coming on before that examination closed, the taking was adjourned until nine o'clock in the morning.

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The story told by these depositions constitutes one of the most outrageous records of oppression, of disregard for the rights of a human being, that ever had itself aired in a court of justice. I call your attention to these things, my friends, so you may, in some degree, become imbued with the proper spirit of this lawsuit and what it means. * * *

Maybe some of you, or all of you, have heard about John G. Saxe, who was in a railroad wreck when the accident did not occur under half the violent circumstances that this did. He was all right until a short time afterward, and then developed into a helpless paralytic—went from his nervous system into the brain, and he died in a private mad-house. I have within my own mind the case of a man who sat with a party of four in seats playing cards on a train. It was a mixed train, and in switching cars the engine sent a car up against this caboose. The other three did not experience any inconvenience from it, but inside of two months he had a contusion of the spine that made him a helpless and hopeless victim.

Mr. Willard: I object to that as not being in evidence.

The Court: It is always done by way of illustration. It is not in evidence. I have never known an argument checked because an illustration was used. It is calling your attention to the experience of persons in life."

Now put these things together. The jury had no concern with the manner of taking the depositions. If that were objectionable, the objections should have been made to the court before the case was called for trial. *Kassing v. Mortimer*, 80 Ill. 602.

If the depositions are read, only the questions to, and answers by, the witnesses are evidence before the jury.

Here was an action for injuries sustained, as alleged, by a railroad accident; a passenger suing the road. That the accident was purposely caused, is so preposterous that nobody thought of it; yet the counsel warms up the jury in advance with the following words: "That no single, humble individual of any community in Illinois should be crushed by an organized aggregation of force against him."

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To prove how this attempt at crushing was made, he tells the jurors of things which legitimately can not come before them. The efforts of the appellant's counsel to stop such a course are vain; worse; for they only serve to draw out the apparent sanction by the court of the conduct and remarks of the appellee's counsel, culminating in a threat, vague, portentous, suggestive of something lingering to make the punishment fit the crime.

When a deposition is read, by the order of the court the conduct of the appellee and his counsel, in a matter not touching the merits of the case on trial, and with which the jury have no concern, is made evidence for the appellee, before the jury, for no other purpose than that the jury—as counsel said at the close—"may in some degree become imbued with the proper spirit of this lawsuit and what it means."

At last counsel by his speech puts in the supposed experience of Saxe, and an unknown card-player, as evidence that nervous disorders may be the result of slight causes, and the court approves the remarks as illustrations.

What do those examples illustrate except that in fact slight causes may produce serious results; and—is it not—therefore it is probable that they did in this case?

Such methods of trying cases are not tolerable, and the only corrective is for counsel to know that by such methods they imperil verdicts in a class of cases in which they are almost sure to win. *West Chicago Street R. R. v. Groshon*, 51 Ill. App. 463; *Same v. Annis*, 62 Ill. App. 180.

We should underrate the sagacity of the counsel of the appellee if we assumed that he had no purpose in forcing into the case as evidence for the appellee the conduct of the appellee and his counsel before the commissioner, and in making evidence by his closing speech.

That purpose could only have been to shut the eyes of the jurors to the weak points of his case, or to aggravate the damages by inflaming them with the notion that the appellant was a fit subject for a severe penalty.

It is no answer to say that the appellee, suing a railroad,

Stanley v. McConnell.

would have had a verdict anyhow; the appellant had the right to be mulcted under the forms of law.

For less objectionable proceedings than this record shows, the Supreme Court of the United States reversed the judgment in *Waldron v. Waldron*, 156 U. S. 361.

The judgment is reversed and the cause remanded.

**Philiskey E. Stanley, for the use of James A. Brophy,
v. Samuel P. McConnell.**

1. **PRACTICE—*Trial by Court—No Propositions of Law Submitted.***—Where a cause is submitted to the court for trial without a jury, and no propositions of law are submitted, the only questions which can be reviewed by the Appellate Court are questions of fact.

2. **AGENTS—*Excess of Authority.***—Permitting property to go to sale for taxes and to buy it in at such sale, is a manifest departure from an authority given to pay taxes.

3. **JUDGMENTS—*Upon Questions of Fact.***—The finding of a trial court upon a bare question of fact, will not, upon appeal, be disturbed when the evidence is conflicting, unless for reasons which would be sufficient to justify the overturning of the verdict of a jury.

Assumpsit, for money paid out and advanced. Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

OLIVER & MECARTNEY, attorneys for appellant.

JAMES H. WILKERSON, attorney for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action to recover a balance of \$362.72 claimed to be due to appellant for moneys paid out and advanced at appellee's request for certificates of tax sales, commissions and carrying charges, in connection with certain of appellee's real estate.

The cause was submitted to the court without a jury, and resulted in finding the issues in favor of the appellee, the defendant below.

No propositions of law were submitted to the court, and the only questions there decided, or here to be reviewed, were ones of fact.

The appellant, Stanley, was, at the time in question, collecting rents for the appellee, and the particular controversy between them arose out of the giving by appellee of the following order :

"CHICAGO, ILL., Aug. 27, 1889.

Messrs. P. E. Stanley & Co.

GENTLEMEN: Please pay the taxes for me on the following pieces of real estate: Lot 67, Culver's Add. to Chicago, \$60.21; lot 4, block eleven (11), Duncan's Add., \$227.93; lot 1, Superior Court Commissioners' Sub. of S. one-half of the N. two-thirds of that part of block 95, north of south thirty-three feet thereof, Canal Trustees' Sub. of W. one-half of Sec, 27, 39, \$172.10. This last piece of property is the one you leased for me.

Very truly,

S. P. McCONNELL."

Concerning the authority so conferred, and what was done thereunder, the appellant, Stanley, testified: "Under this order I bought the taxes in the name of James A. Brophy. I mean by that, that I bid this property off at tax sale. The certificates came into the office, were paid for and money borrowed on them. I advanced the money and paid for the certificates. * * * The firm of which I was a member was, at that time, collecting rents and handling property for Judge McConnell. * * * I subsequently made a present of the tax business which was conducted by me to James A. Brophy. I turned over absolutely all interest in the tax business to Mr. Brophy. I do not claim any interest whatever in any of these purchases made prior to turning it over to Mr. Brophy. About the fall of 1889, or spring of 1890, I turned it over to Brophy. The money advanced on these sales was turned over along with the other. It was a car-

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rying account in the office. The money was borrowed on that, with others, and I turned it over to Brophy. * * * Subsequently I called on Judge McConnell about this bill, and tried to collect it—probably about six months after the time of the purchase. He was too hard up to pay it. * * * I went there in the interest of the legal holder of that security, or whatever you call it, to collect it. * * * I told him the amount due. I don't remember the amount due at that time. The amount due now is about \$362. He said he would pay it as soon as he could. * * * I went in the interest of the legal holder of the indebtedness, who was William H. Burnet. I borrowed the money of him to advance to pay for the taxes of Judge McConnell, and he held the tax certificates at that time. * * *

The money has never been repaid to Burnet yet. The order introduced in evidence is the order upon which I acted. That was the written instructions he gave me after I had made arrangements to buy his taxes at tax sale and protect him."

It was testified by one who was bookkeeper for Brophy, and by another who was clerk for both Stanley and Brophy, that they severally presented the account to appellee on repeated occasions, and asked for its payment, and that appellee on various grounds excused himself, but never objected to its correctness.

The clerk also testified that he left a copy of the account with appellee, and that on one occasion appellee offered to pay him \$100 to apply on it, but that he, the witness, declined to accept part payment for lack of authority to do so.

On the other hand, the appellee denied having at any time, in any manner authorized Stanley to permit the property to go to sale and buy it in, and denied any knowledge that such a course had been adopted by Stanley until long afterward, when, having made a sale of one of the pieces of property, he first discovered the method that had been pursued by Stanley, and he testified that he then promptly repudiated the action and disavowed Stanley's authority to

do so. He admitted that he did at one time offer to pay \$100 to the clerk who presented the bill to him, in settlement of the controversy, but that the offer was declined, and such was probably the true scope of the offer he made, for it is unreasonable to suppose that one having authority to collect an account should refuse to accept \$100 to apply on it, especially where, as here, there had been credited on the account other partial payments by way of rents collected, etc.

It was also shown by appellee that Brophy had served upon appellee the usual notices that the property had been sold for taxes, and of the time of the expiration of the right to redeem therefrom.

We need hardly say that permitting the property to go to sale and buying it in at such sale, was a manifest departure from the authority given to pay the taxes. It may have been a convenient method of enabling Stanley to procure money to keep the property from being sold to strangers, who would hold the tax certificates of sale adversely to appellee, but it was of course wholly unwarranted by the authority to pay the taxes.

True there is a possible intimation, at the close of Stanley's testimony, that previous to the written instructions above quoted, there was an arrangement between himself and appellee that he should buy the property at the tax sale, but it is very vague, and is not corroborated by anything else in the record, and if it were true, the rule would probably require it to be held that any such prior arrangement was merged in the subsequent writing, under which, admittedly, Stanley acted.

The proposition of appellant, that because appellee redeemed the piece of property sold by him from the tax sale, which redemption money was received by Brophy and credited on appellee's account, the appellee thereby accepted the fruits of the transaction done by Stanley and ratified it, is without much foundation. Appellee has apparently accepted the situation as best he may, leaving to appellant whatever remedies he may have under his tax purchase, and

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taking his own course to be relieved from the effect of such purchase whenever the situation may confront him. The appellant can hardly say that by appellee redeeming from the sale, and thereby making it possible for the appellant to get back his money, the appellee in effect ratified the tax sale and appellant's proceedings with reference to it.

The final point, that an account stated was proved, comes closer to being well taken. By force of mere numbers of witnesses, the preponderance might be said to be in favor of appellant.

But it is a long established and statutory rule that the finding of the trial court upon a bare question of fact will not, upon appeal, be disturbed when the evidence is conflicting, except for reasons sufficient to justify the overturning of the verdict of a jury.

There appears to be no sufficient error in the record to warrant us in disturbing the judgment of the Superior Court, and it will accordingly be affirmed.

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165a 472

North Chicago Street Railroad Company v. Adelbert W. Olds.

1. **BILL OF EXCEPTIONS—*Action by the Court in Relation Thereto.***—All action by the court in relation to bills of exceptions, except the mere signing by the judge, is in its nature judicial. If done after the term, notice is necessary.

2. **SAME—*Signing the Same Nunc pro Tunc.***—A bill of exceptions can not be signed *nunc pro tunc*.

3. **SAME—*Not Under Seal.***—If the seal of the judge is not affixed to his signature to the bill of exceptions, the bill itself is of no avail.

4. **SAME—*Signed After the Expiration of the Time Fixed.***—The signing of a bill of exceptions by the judge, after the time for doing so has expired, is of no legal effect.

5. **TRESPASSER—*On Railroads.***—A person who, without right, after being put off a car, follows it up and gets on again, is a trespasser and can not recover if, without the use of unnecessary force, he is injured in being a second time put off the car.

6. **SPECIAL INTERROGATORIES.—*To be Question of Fact.***—A special interrogatory—“Was the plaintiff a trespasser when he got on defendant's car the second time?”—is a question of law, and the answer is not to be considered.

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Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

CONSIDER H. WILLETT, attorney for appellee; OSCAR H. McCONOUGHHEY, of counsel.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

February 1, 1896, being still within the January term of the Supreme Court, the appellee obtained judgment against the appellant from which it prayed and was granted an appeal, and leave given to file a bill of exceptions within twenty days from that date.

The record shows that on February 18th and again on the 21st, on motion of the appellant's attorney, an order was entered in each instance that the time to file a "bill of exceptions herein be and is hereby extended five days." Giving the most liberal construction to those orders, the time under the last one expired March 2, 1896. The bill of exceptions concludes: "Signed this 4th day of March as of the 21st day of February, A. D. 1896.

JAMES GOGGIN, [SEAL]
Judge of the Superior Court of Cook County."

And the original bill of exceptions, which is in the record under a stipulation, is indorsed: "Filed March 4-96, *nunc pro tunc* as of February 22, '96.

S. D. GRIFFIN, Clerk."

The appellee moves to strike it out. Below the signature of the judge are the words: "Presented in open court this twenty-first day of February, A. D. 1896.

JAMES GOGGIN, Judge."

Can we regard these words? There is no statute or common law which warrants our doing so. If the seal were not affixed to the signature to the bill, the bill itself would be of no avail. French v. Hotchkiss, 60 Ill. App. 580.

North Chicago St. R. R. Co. v. Olds.

Notwithstanding the loose practice in this State contemplates that the parties will be constantly on the watch, so that no notice is necessary so long as the case is pending, and thus the court retains jurisdiction, yet there is so much of safety remaining that on direct proceedings to review, the jurisdiction of the court must be shown by the record. *Law v. Grommes*, 158 Ill. 492; *Morgan v. Campbell*, 54 Ill. App. 242.

Now all action by the court in relation to bills of exceptions, except the mere signing by the judge, is in its nature judicial. *U. S. Life Ins. Co. v. Shattuck*, 159 Ill. 610. Settling the bill is a judicial act. *Emerson v. Clark*, 2 Scam. 489.

If done after the term, notice is necessary. *Railway Passenger, etc., v. Leonard*, 62 Ill. App. 477; *Heinsen v. Lamb*, 117 Ill. 549.

There is no possible reason for presenting a bill of exceptions to a judge other than that he shall settle and sign it, and if it be presented under such circumstances that he has no authority to do either, such presentation is necessarily a mere nullity. Now if we read as evidence of the facts what is written below the signature to the bill, the result is probably that February 21, 1896, some messenger of the appellant came into court, without notice to anybody, poked this bill at the judge, who wrote his name at the end of the words written, and then the messenger went off carrying the bill with him; all of which acts were utterly idle, and of no legal effect.

Whether the position that the parties can not, by agreement, extend the time after the term, is to be adhered to or not (*Humphreyville v. Culver*, 73 Ill. 485), the mere stipulation under the statute to use the original as part of the transcript, waives nothing as to the original.

The bill of exceptions was signed and filed when all power had ended. *Railway Passenger, etc., v. Leonard*, Supreme Court, May 12, 1896.

No presumptions in favor of jurisdiction ought to be entertained; if not shown, it should be held non-existent.

The motion to strike out, ought, in my judgment, to be sustained, but neither of my colleagues agrees with me.

This action is for personal injury to the appellee. The case is stated in 40 Ill. App. 421.

On the last trial, at the instance of the appellee, special questions were submitted to the jury, which questions, and the answers by the jury thereto, are as follows:

“Q. Was the plaintiff a trespasser when he got upon defendant's car the second time? A. No.

Q. Did the plaintiff conduct himself in a disorderly manner or use any improper language or conduct himself in any way to give offense to any passenger of defendant? A. No.

Q. Was the plaintiff put off of defendant's car when the same was in motion, and was he put off in a dangerous place? A. Yes.”

The first question is of law, and the answer not to be considered.

On the testimony of the appellee himself, he was a trespasser.

He testified that he was shoved off, followed the car and got on again.

We are bound by the law we laid down on the first appeal. Union Mut. Life Ins. Co. v. Kirchoff, 51 Ill. App. 67; 149 Ill. 536.

We therefore hold that the appellee was a trespasser, having been put off the same car but a few moments before by the conductor, and without right re-entered upon the car of the appellant, and that, without unnecessary force, he was put off said car by the conductor for good cause, and without other injury to him than such as resulted from his own wrong, and we reverse the judgment without remanding the case. This course will enable the Supreme Court to decide whether the bill of exceptions is properly in the record; if it is not, this judgment is wrong, and that of the Superior Court should be affirmed. Judgment reversed.

West Chicago St. Ry. Co. v. Dougherty.

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170s 379**West Chicago Street Ry. Co. v. Martin Dougherty.**

1. **PRACTICE—*Pertinent Suggestions.***—In cases against corporations for personal injuries, prudence on the part of counsel for plaintiff is quite as important as skill. Verdicts sure to come are often lost by too much zeal. The plaintiff has more reason to fear what the court may do for him at the request of his counsel, than he has need of the aid of the court.

2. **INSTRUCTIONS—*Calling Attention to a Witness by Name.***—An instruction which calls attention to a witness by name is subject to criticism.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

McCRACKEN & CROSS, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee recovered a judgment for personal injury sustained by him by a collision between a wagon in which he was riding and a grip car at a street crossing.

On the questions of fact—negligence and the amount of damages—the evidence was such as to make the verdict of the jury conclusive.

One O'Brien was driving the horse drawing the wagon, and with reference to O'Brien's driving at the crossing, the appellant asked the appellee on cross-examination as a witness, "You approved of what he did?" to which question the court sustained an objection, and the appellant excepted. No offer or attempt was made to show that the appellee in any manner interfered in the driving, and of what significance can it be what he thought about it?

The question to the gripman whether he could have done anything more than he did to stop the car called for no fact, and was rightly rejected. Only the opinion of the witness

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appeared by the answer he did give, and which is not fairly shown to have been struck out, and the striking out excepted to.

At the instance of the appellee the court instructed the jury :

“The court instructs the jury that the testimony of James O’Brien which was taken in the shape of his deposition and has been read to you, is to be considered by you with all the other evidence in the case, and you are to give it such weight as you may think it entitled to in connection with all the circumstances appearing in the case from the evidence and in connection with all the other evidence in the case.”

In this class of cases prudence on the part of counsel for plaintiff is quite as important as skill. Verdicts sure to come, are often lost by too much zeal. The plaintiff has more reason to fear what the court may do for him at the request of his counsel, than he has need of the aid of the court.

This instruction is subject to criticism only in that it calls attention to a witness by name. *Brown v. Monson*, 51 Ill. App. 488; *Penna. Co. v. Versten*, 140 Ill. 637.

But as is said in *Phenix Ins. Co. v. La Pointe*, 118 Ill. 384, “it often happens that the giving of an instruction would not constitute reversible error, where the refusal of such instruction would not be improper.” This instruction, unlike the one in *Brown v. Monson*, does not refer the jury to the version by the witness of the transaction under investigation and it is hardly possible to believe that it affected the result.

What has been said and cited justifies the refusal of an instruction asked by the appellant as follows :

“The law of this State allows a party to a suit to testify in his own behalf as a witness, but it provides that the interest of such party in the result of the suit may be shown for the purpose of affecting his credibility; and in this case in passing upon the weight to be given to the testimony of the plaintiff the jury may consider his interest in the result of the suit.”

The judgment is affirmed.

West Chicago St. R. R. Co. v. Mueller.

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165 499

West Chicago Street Railroad Co. v. John H. Mueller.

1. **PRACTICE—Province of the Court and Jury.**—It is the sole province of the jury to determine the weight that evidence should receive, and equally so to consider conflicting evidence, without any assistance from the court.

2. **INSTRUCTIONS—Must be as to the Law.**—An instruction telling the jury that when one or more witnesses testify to being present upon any occasion, and that certain facts then took place, and other witnesses, of equal credibility, having equal means of knowing what took place, testify that they were present on the same occasion, and that such facts did not take place, then the testimony of the latter witnesses is not what is known as negative testimony, but is entitled to be regarded by the jury as affirmative testimony, goes too far in telling the jury how the testimony was entitled to be regarded.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

McCRACKEN & CROSS, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

On the trial the court at the instance of the appellee gave, and the appellant excepted to, the following instruction:

“The court instructs the jury that when one or more witnesses testify to being present upon any occasion and that certain facts then took place, and other witnesses of equal credibility, having equal means of knowing what took place, testify that they were present on the same occasion, and that such facts did not take place, [then the testimony of the latter witnesses is not what is known as negative testimony, but it is entitled to be regarded by the jury as affirmative testimony; and in such case] it is the duty of the jury to weigh all the testimony, and give a verdict as the weight may preponderate to one side or the other.”

That the Supreme Court, in reviewing facts, has approved the principle stated, does not make that principle a rule of law. It is like what they have said when reviewing the fact of negligence. *C. & N. W. Ry. v. Trayes*, 33 Ill. App. 307.

In *Frizell v. Cook*, 42 Ill. 362, the court held the opposite of this instruction error, and so much of this as omits what is within brackets, correct; but in that case—as in effect is said in many others—it is said, “it is the sole province of the jury to determine the weight that evidence should receive, and equally so to consider conflicting evidence, without any assistance from the court.” And see *L. N. A. & C. Ry. v. Shires*, 108 Ill. 617. This instruction goes too far in telling the jury how testimony was “entitled to be regarded.” That was a matter simply of fact—not law. *Best, Prin. Ev.*, Sec. 270; *Wharton, Ev.*, Sec. 415.

Taking all circumstances together, the jury should decide which class of witnesses they would believe, and the court ought not to intimate that one class was better than, or equal to, another.

But the matter to which that testimony related was whether the gripman on a cable car which was about to pass westward, north of a train standing at the east cross-walk on Madison street at the intersection with California avenue, was ringing the bell on his car at the time the appellee was approaching from the south, driving a wagon.

The situation was that the west-bound train entered upon the intersection while an east-bound train stood in such a position that it hid the west-bound from the view of people approaching from the south. Under similar circumstances accidents often happen. *C. C. Ry. v. Wilcox*, 33 Ill. App. 450.

It is not reasonable to believe that the result was influenced by this instruction. The only other matter complained of, is that the appellee was permitted to prove the speed of the cable.

There was other testimony tending to show that the car was running at the full speed of the cable, but not what that speed was in fact in miles per hour; so such testimony was necessary to make the indefinite definite.

The judgment is affirmed.

E. S. Rice v. Western Fuse and Explosives Company.

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98 222

1. **APPELLATE COURT PRACTICE—Errors Waived.**—Where the brief of the appellant fails to urge that any error was committed in rejecting testimony, such errors are waived by silence.

2. **AGENTS—When Personally Liable.**—Where a party acting as an agent makes a contract outside of his authority, it binds him personally, but not his principal.

3. **CONTRACTS—For Purchase of Goods—Prices.**—The fact that the parties had a contract in writing between them for a certain amount of fuse, at certain prices, does not necessarily control the prices of fuse ordered afterward, and with the knowledge that prices had advanced.

Assumpsit.—Goods sold and delivered. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

THORNTON & CHANCELLOR, attorneys for appellant.

FLOWER, SMITH & MUSGRAVE, attorneys for appellee.

It is a well established rule of law that a party signing a contract in the manner this was signed makes himself personally liable. The words "Agent, etc., " are merely descriptive.

In Powers v. Briggs, 79 Ill. 493, the action was on the following note:

"One year after date, we, the trustees of the Seventh Presbyterian Church, promise to pay to the order of H. G. Powers six hundred dollars, value received, with interest at six per cent per annum.

A. H. BRIGGS,
LOUIS B. KELLEY,
JOHN CORBETT,
F. D. MARSHALL,
Trustees."

The trustees were held personally liable, although it was shown the debt was that of the church.

To the same effect are Wheeler v. Reed, 36 Ill. 81;

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Bickford v. Bank, 42 Ill. 237; Trustees v. Rantenberg, 88 Ill. 219; Hypes v. Griffen, 87 Ill. 134; McNeil v. Shober Co., 144 Ill. 238; same case, 44 Ill. App. 297; Williams v. Miami Co., 36 Ill. App. 107.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

February 2, 1891, these parties, the appellant being described as "E. S. Rice, Gen'l Agent for E. J. Du Pont de Nemours & Co., * * * party of the second part," in the body of the paper, and signing it "E. S. Rice, General Agent," made an agreement in writing, by which the appellee agreed to deliver to the appellant—if the agreement is to be treated as personal with him—fuse in Chicago, "it being understood that the present prices for such fuse * * * shall be" so and so.

June 12, 1893, the appellant telegraphed for two hundred and seventy-five cases of fuse, to which appellee replied the next day that it would ship, but at prices considerable higher than those named in the agreement. The appellant, on the next day, answered, "Ship at once. Drainage work on. Must have fuse."

The appellee shipped the fuse, and the appellant sent his check for it at the old prices, but refused to pay the residue; hence this suit.

The appellant testified somewhat, and desired to testify more, as to his authority to act as agent for Du Pont; but the brief of the appellant does not urge that any error was committed in rejecting testimony. We need not, therefore, consider such a question. It is waived by silence. Cook v. Moulton, 59 Ill. App. 428.

The testimony he did give is not enough to show that he had authority to make for Du Pont such agreement. It therefore binds him personally. Wheeler v. Read, 36 Ill. 81. Apt words are in it to charge him, in which respect it is unlike Neufield v. Beidler, 37 Ill. App. 34, and other cases cited by the appellant in which it has been held that the person signing was not personally bound.

West Chicago St. R. R. Co. v. Piper.

His second point is that the higher price can not be recovered. He ordered at that price. The prices named in the agreement were only present prices, with no implication even that they would continue. There was no duress even under the extreme doctrine of *Pemberton v. Williams*, 87 Ill. 15.

There it was the one and only deed that the plaintiff must have. Here the world was open for the appellant to search for fuse. The bargain he made, by ordering the fuse after being informed of the price, he must abide by.

Cases, that offers by correspondence can not be retracted, if accepted promptly before notice of retraction, have no resemblance to this. These are the only points argued, and the judgment is affirmed.

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185 835

West Chicago Street Railroad Co. v. Minnie D. Piper.

1. **VERDICTS—On Conflicting Evidence.**—A verdict upon conflicting evidence is, as a general rule, conclusive upon the parties.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

EGOBET JAMIESON and JOHN A. ROSE, attorneys for appellant.

HIRAM BLAISDELL and JOHN F. WATERS, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action in which the appellee recovered a judgment against the appellant for personal injury, alleged to have been caused by negligence of the appellant.

She was a passenger in a carette (omnibus) which was struck on the side by a grip car of the appellant on a curve on a street corner. The carette was crossing the car track.

Of course, with a woman suing a street railroad, the jury would say that the railroad was in fault; because the mere fact that the side of the carette was struck by the front end of the grip car, demonstrates that the carette was first on the crossing, and had the right of way.

In addition to that, the conflicting evidence really made it a question which was in fault. The court instructed the jury that if both the driver of the grip and the driver of the carette were in fault, she was not chargeable with the fault of the latter; which is correct law. *Chicago City Ry. v. Wilcox*, 33 Ill. App. 450, cites the cases.

It was admitted that the appellee once sued the carette company, but what became of the case the appellant failed to show, or rather fails to present here any evidence of such showing, as the documents are not in the abstract.

She testified that she did not know whether she received any money from the carette company; that her attorneys probably received \$100. Whether incompetent evidence, on her part, of the terms of settlement (if one was made) with the carette company was received, is immaterial, because such evidence could be only in rebuttal of a defense not proved.

There is no error and the judgment is affirmed.

Mary Corrigan v. Minnie Reid.

1. **VERDICTS--*Questions of Fact.***—A verdict upon questions of fact is, as a general rule, conclusive upon the parties.

Assumpsit, for money paid, etc. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

STATEMENT OF THE CASE.

This was an action brought by Minnie Reid, appellee, against Mary Corrigan, appellant, for the purpose of charging Mary Corrigan with attorney's fees and costs in a suit

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entitled Reid v. Corrigan, on the appeal of the suit by Minnie Reid from the decision of the Appellate to the Supreme Court. The present action was tried in the Circuit Court, with the result of a verdict and judgment for appellee, for \$863.88, upon which verdict a judgment was entered.

OSCAR E. LEINEN, attorney for appellant.

RICHARD PRENDERGAST, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Minnie Reid was a legatee under the will of Michael Corrigan. Mary Corrigan, his widow, appeared to have an interest in having the legacy to Minnie Reid charged upon the residuary estate devised by the will of Michael Corrigan. The right to so charge this legacy was disputed by such devisees.

Under these circumstances, it is alleged that Mrs. Corrigan authorized Minnie Reid to commence suit to obtain a construction of the will favorable to her claim that the legacy to her should be charged against the estate given to the residuary devisees, and promised Minnie that she, Mary, would defray the expense of conducting such suit.

Minnie Reid began the suit, obtained a decree in the Circuit Court favorable to her claim, which decree was reversed in the Appellate Court; whereupon she applied to the Supreme Court, with the result that there the decree of the Circuit Court was affirmed.

Mrs. Corrigan paid the expense of the proceeding through the Circuit Court and Appellate Court.

To obtain what Minnie Reid paid for the expense of carrying the case to the Supreme Court this suit was brought. The dispute is entirely concerning a question of fact. The jury were by the evidence warranted in finding for the plaintiff. There was good reason for the alleged promise of appellant, as well as a valid consideration for such promise.

The judgment of the Circuit Court is affirmed.

Edward Hines Lumber Company v. Charles F. Ream.

1. **NOTICE—*Of Trials on Short Cause Calendar.***—Under the rule of court requiring eleven days notice of trial for cases upon the short cause calendar, a notice served on the fifth is sufficient for Monday, the sixteenth.

2. **JUSTICES OF THE PEACE—*Division of Cause of Action.***—A party having an open account against another, is not required to sue for more than he wishes to when bringing an action before a justice of the peace.

3. **APPELLATE COURT PRACTICE—*What the Abstract Must Show.***—The burden is upon the plaintiff to show by his abstract that the judgment of the court below is erroneous, and in what that error consists.

Assumpsit, for work, labor and services. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

GRAHAM H. HARRIS, attorney for appellant.

CHARLES L. MAHONY, attorney for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This case is for wages earned by the appellee, and was commenced before a justice. The first objection made by appellant's brief relates to an abandoned effort by the appellee to place the cause upon the "Short Cause Calendar," which effort, being abandoned, we need not consider.

Next, that as the rule of court requires that notice to place a cause upon that calendar shall be served, not later than eleven days before the day on which it is set for trial, a notice on the 5th—the 15th being on Sunday—is too late for Monday, the 16th, because Sunday is not to be counted. The same question in principle was decided in *Bowman v. Wood*, 41 Ill. 203. Service on the 22d of September, 1865 (which we judicially know was Friday), was held to be in time for the term, beginning October 2d (which was Monday); Sunday was counted as one of the necessary ten days, and if

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Friday be ten days before the second Monday following, Thursday must be eleven.

It is also objected that, under the second notice, the cause occupied the same position on the calendar that it had received under the abandoned one, which well might be, as there is nothing to show that any other cause was on it at all. Then it is said, that after the appellee had worked for the appellant at their yards for more than eight months, and it had paid him \$350 on account of wages, proof that he was engaged by the president was not sufficient to charge the company, and that if he was paid all that was due him, it would exceed the jurisdiction of the justice by two dollars, and therefore he ought to recover nothing. *Raymond v. Strobel*, 24 Ill. 113, decides that a plaintiff need not sue for more than he wants.

Lastly, it is said that damages for delay ought not to have been given. The abstract does not show what judgment was rendered, and what other purpose than delay the appeal was for we can not discover.

Having thus considered all the weighty reasons for reversing this judgment, it is affirmed.

Frank C. Vierling and John V. Baxter v. Zoe Owens.

1. **PLEADINGS—*Distress Warrant for a Declaration*.**—A distress warrant in a proceeding by distress, takes the place of and stands for a declaration.

2. **PARTIES—*Proceedings by Distress*.**—Proceedings in distress for rent are improperly brought in the joint names of the landlord and his agent.

3. **VARIANCE—*Between Distress Warrant and Lease*.**—A variance between a distress warrant and a lease upon which it issued, when offered in evidence, is fatal.

4. **RENTS—*Houses of Ill-Fame*.**—The fact that a house is knowingly rented for the purpose of being used as a house of ill-fame is a defense to an action for rent.

Distress for Rent.—Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

JAMES E. PURNELL, attorney for appellants.

"In order to defeat a recovery for rent upon the ground of illegality, it must appear that they were let to be used for an illegal or immoral purpose; and the mere fact that they were so used does not operate as a defense unless they were let for such purpose, and the landlord, before the lease was executed, knew that the lessee would devote them to such purpose." *O'Brien v. Briestenbach*, 1 Hilt. (N. Y. C. P.), 304; *Smith v. White*, L. R., 1 Eq. Cas. 626; 2 Wood's *Landlord and Tenant* 549; *Stookey v. Hughes*, 18 Ill. 55; *Wear v. Parish*, 26 Ill. 240; *Miller v. Wells*, 46 Ill. 46; *Marshall v. Gridley*, Id. 247; *Purinton v. Northern Ill. R. R. Co.*, Id. 265; *Freese v. Ideson*, 49 Ill. 191; *Hutton v. Arnett*, 51 Ill. 198; *Lonergan v. Stewart*, 55 Ill. 44; *Ball v. Benjamin*, 56 Ill. 105; *Lighthall v. Colwell*, 56 Ill. 108; *Monmouth First National Bank v. Whitman*, 66 Ill. 331; *Emery v. Mohler*, 69 Ill. 221; *Hartford Fire Insurance Co. v. Webster*, 69 Ill. 392.

BRECKENRIDGE & RASMUSSEN, attorneys for appellee.

A contract may be in fraud of a statute. The one in this case was contrary to the statute, against public policy and in fraud of the rights of the public, hence void. 7 Wait's *Actions and Defenses*, 64, 65; *Preston et al. v. Spaulding et al.*, 120 Ill. 208; *Lee v. Lee*, 8 Pet. (U. S.) 44.

The purpose for which the premises were rented may be shown by parol to be other than that stated in the written lease. 9 Am. & Eng. Enc. of Law, 921, VI; 7 Wait's *Actions and Defenses*, 66, Sec. 2; *Hanauer et al. v. Doane*, 12 Wall. 342; 79 U. S. 196; *Riley v. Jordan*, 122 Mass. 231; *Sherman v. Welder*, 106 Mass. 537; *Brown v. Brown*, 34 Barb. 533; *Foy v. Blackstone*, 31 Ill. 558; *Black v. W., St. L. & P. Ry. Co.*, 111 Ill. 351.

The degree of evidence in a civil case in which the pleadings allege a violation of the criminal code, is the same as in any other civil action. *Welch v. Jugenheimer*, 56 Iowa, 11; *Blaeser v. Insurance Co.*, 37 Wis. 31; *Schmidt v. Insurance Co.*, 1 Gray 529; *Scott v. Insurance Co.*, 10 Dillon 106;

Vierling v. Owens.

Cooley on Torts, 208, (2d Ed.) 243; May on Insurance, Sec. 583 and note; Hutchberger v. Insurance Co., 4 Bliss 265; Insurance Co. v. Johnson, 11 Bush. 587; Sloan v. Gilbert, 12 Id. 51; Hoffman v. Insurance Co., 1 La. Ann. 216; Wightman v. Insurance Co., 8 Rob. 442; Insurance Co. v. Wilson, 7 Wis. 169; Gordon v. Parmlee, 15 Gray 413; Elliott v. Van Buren, 33 Mich. 49; 3 Greenleaf on Evidence, Sec. 29.

Where the evidence is uncontradicted and so clear that the court would be warranted in setting aside a verdict contrary to the one found, the case will not be reversed for error in giving or refusing instructions. Howard F. & M. Ins. Co. v. Cornick et al., 24 Ill. 455; Burling, Admx., v. I. C. R. R. Co., 85 Ill. 18.

And this rule obtains even in criminal cases. Burke v. The People, 148 Ill. 70; Zimm v. The People, 111 Ill. 49; Kennedy v. The People, 40 Ill. 488.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a distress upon the goods and chattels of the appellee, under a distress warrant issued in the joint names of Frank C. Vierling and John V. Baxter, the appellants.

The lease that was introduced in evidence was under seal, and was made by the appellant Frank C. Vierling, alone, to the appellee.

When the lease was offered in evidence, it was objected to by the appellee on the ground of variance between it and the distress warrant, and the particular variance was pointed out to the court, but, apparently, because it had been testified by Vierling that he was the agent of Baxter for the premises described in the lease, the objection was overruled.

It was not attempted to prove that Baxter was the owner of the premises, and the only thing the record contains from which the possible inference might be drawn that he was the owner, is that the word "Landlord" follows his name as subscribed to the distress warrant.

Nothing that is contained in the distress warrant in any

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manner shows the relation of Baxter to the premises or to the lease, and nothing appears in the lease to connect him in any manner with Vierling or the premises.

A district warrant in a proceeding for distress takes the place of and stands for a declaration.

When, therefore, the lease was objected to, the objection should have been sustained as being variant from the declaration, which in this case was the distress warrant.

The cause, however, proceeded—and upon a different defense—that of the illegality of purpose for which the premises were rented, *i. e.*, that they were knowingly rented for the purpose of being used as a house of ill-fame, as the appellee testified. The verdict and judgment were for the appellee.

Without considering this latter phase of the case, it is sufficient that the judgment was right on the ground that the distress proceedings were wrongly begun in the joint names of the appellants, and it is accordingly affirmed.

64	619
69	648
64	612
70	368
167*	480
64	612
76	407

64	612
99	*518
64	612
102	*872
102	*487

Wheatley, Buck & Co. v. Chicago Trust and Savings Bank.

1. **PRACTICE—*Judgment in Excess of the Ad Damnum—Waiver.***—The fact that the judgment recovered is in excess of the amount claimed in the *ad damnum* is error, but is waived by not being raised or in any manner brought to the attention of the court below.

2. **SHORT CAUSE CALENDAR—*Trial of Case Upon—Waiver.***—The fact that a cause upon the short cause calendar is not at issue when called for trial, is waived by the parties agreeing to submit the same for trial by the court without a jury.

3. **INSOLVENCY—*Proof.***—In an action against the indorser of a promissory note, the insolvency of the maker may be proved the same as any other fact.

4. **CORPORATIONS—*Proof of Corporate Existence—When Necessary.***—Proof of the averment that the defendant is a corporation is not necessary under our practice unless challenged by the plea of *nul tiel corporation*.

5. **SAME—*Corporate Existence Admitted.***—Where the defendant, by his peculiar form of pleading, admits the corporate existence of the plaintiff, he can not afterward deny such corporate existence.

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Assumpsit, against the indorser of a promissory note. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

JOSIAH BURNHAM, attorney for appellants.

JOHN G. HENDERSON, attorney for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT. When first begun, on July 28, 1893, this was a suit by the appellee against the appellant as indorser of two promissory notes, for \$1,050 and \$525, respectively. Subsequently, and on December 2, 1895, it was stipulated by counsel for the respective parties, that an additional count to the declaration might be filed counting upon appellant's liability as indorser and guarantor of another note for \$1,000, the same as if said note had become due prior to the beginning of the suit, and an additional count was filed charging the appellant as guarantor of said note.

The three notes so declared upon were as follows:

“\$1,050.00. CHICAGO, Ill., June 10, 1893.
Thirty days after date I promise to pay to the order of Wheatley, Buck & Co. one thousand fifty and no $\frac{0}{100}$ dollars, payable at C. T. & S. Bank. Value received.

JOHN B. SKINNER.

(Indorsed:) WHEATLEY, BUCK & Co.”

“\$525.00. CHICAGO, Ill., June 13, 1893.
Thirty days after date I promise to pay to the order of Wheatley, Buck & Co. five hundred twenty-five and no $\frac{0}{100}$ dollars, payable at C. T. & S. Bank. Value received.

JOHN B. SKINNER.

(Indorsed:) WHEATLEY, BUCK & Co.”

“\$1,000. JUNE 30, 1893.
Thirty days after date I promise to pay to the order of Wheatley, Buck & Co. one thousand dollars at C. T. & S. Bank, Chicago.

JOHN B. SKINNER.

(Indorsed as follows:) WHEATLEY, BUCK & Co.

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For value received . . . hereby guarantee the payment of the within note at maturity, or any time thereafter; and to further secure the payment of the same, hereby authorize any attorney to appear in any court of record, at any time hereafter, and confess a judgment, without process, in favor of the holder for the amount of said note, with interest at seven per cent per annum, costs, and ten per cent attorney's fees, hereby waiving and releasing all error, and ratifying all said attorney may do by virtue hereof, and consenting to immediate execution.

WHEATLEY, BUCK & CO."

Before the count upon last described note was filed, the cause had been placed upon the short cause calendar, but owing to numerous continuances, for various reasons, it was not actually called for trial until on the 6th of January 1896, when by agreement of parties that day made in open court, the cause was submitted to the court without a jury, and judgment in favor of appellee followed, for \$2,896.87.

It is from such judgment this appeal is prosecuted.

The contentions urged against the judgment are numerous, and are mostly technical objections.

The *ad damnum* when the suit was begun was laid at twenty-five hundred dollars, and was not increased when the additional count upon the last described note was filed. Hence, the judgment exceeded the *ad damnum* by nearly four hundred dollars. This is assigned for error, and was error, but it was error of a kind that could be and was waived by not being raised or in any manner brought to the attention of the trial court where it could and doubtless would have been corrected by the allowance of an amendment. *Metropolitan Acc. Ass'n v. Froiland*, 161 Ill. 30; same case, 59 Ill. App. 522; *Cunningham v. Alexander*, 58 Ill. App. 296.

It is also assigned for error that the cause was not at issue when placed upon the short cause calendar as required by a rule of the Superior Court, which provides that "no cause shall be noticed for trial until the same is at issue."

When the cause was placed upon the short cause calendar

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in October, 1895, issues were completely joined by pleas and replications filed long before.

We regard all that was done in the way of making up issues under the added count after the cause had been placed upon the short cause calendar, as having been done in pursuance of the stipulation of parties with reference to bringing into the one suit the additional last described note, and that if appellant desired to have the cause stricken from the short cause calendar on that account, he should have moved to have it done at his first opportunity, and not have waited until the very day the cause was reached for trial. *Stewart v. Carbray*, 59 Ill. App. 397; *Johnston v. Brown*, 51 Ill. App. 549; *Treftz v. Stahl*, 46 Ill. App. 462.

Furthermore, the objection was waived by appellant at the same time agreeing to submit the cause for trial by the court without a jury. *Pratt v. Hunt*, 41 Ill. App. 140.

The point that the affidavit for placing the cause upon the short cause calendar was insufficient, is not well made. *Angus v. Orr & Lockett Co.*, 64 Ill. App. 378.

It is further objected that the declaration did not allege that appellee was a corporation. The objection was raised at the close of appellee's case, and an appropriate amendment was at once made.

An amendment alleging the corporate existence of the appellee was not necessary. Its name could not be taken to be that of a natural person, and implying, as its name does, that it is a legal entity, it must have been that of a corporation.

Furthermore, the appellant pleaded the general issue, and also special pleas to "its," the appellee's, cause of action.

We think the rule in Illinois is, although the holdings out of this State are not uniform, that the averment that appellee was a corporation was not necessary, and that proof of the fact was not necessary unless challenged by a plea of *nul tiel corporation*. *Morris v. Trustees of Schools*, 15 Ill. 266; *Legnard v. Crane Co.*, 54 Ill. App. 149; *Union Cement Co. v. Noble*, 15 Fed. Rep. 502; where the subject is discussed and cases are cited.

But, under the rule in any jurisdiction, the amendment obviated the objection. It was made in time, and it is plain the appellant was not taken by surprise or injured by it.

Under leave by the court to the appellant for a plea of *nul tiel corporation* to be filed, and considering it as if filed, the appellee made what we regard was sufficient proof, under the circumstances, of the corporate existence of the appellee, and appellant offered no evidence to the contrary.

It is also insisted that the appellant was not sued without alleging what persons composed it. This is upon the assumption that Wheatley, Buck & Co., as sued, is not a corporation. Its name does not necessarily imply that it is a corporation, but it was sued in that name, and appeared and pleaded under that name.

Its plea of the general issue to the original declaration, is as follows:

“And now comes the said defendant by Josiah Burnham, its attorney, and defends * * * and for plea says that it did not undertake, * * * as the said plaintiff hath above complained against it, and of this it puts itself upon the country.”

Its first plea to the amended declaration begins thus:

“And now comes the defendant, Wheatley, Buck & Co., a corporation, by Josiah Burnham, its attorney,” etc.; and the affidavit to the special plea denying the execution of the contract of guaranty, is made by William M. Wheatley, who “says that he is president of the defendant corporation, and its duly authorized agent,” etc.

After so appearing and pleading, the appellant can not deny its corporate existence. 2 Ency. of Pl. & Pr. p. 670, and note 4.

The further objection is made that incompetent evidence was admitted, and that so admitted it was insufficient to show the insolvency of Skinner, the maker of the notes. His insolvency was a fact that might be proved in numerous ways.

The witness Tolman, for the appellee, testified—and there was no contradiction of what he said—that Skinner was

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insolvent; that he had failed and made an assignment owing a great deal of money, and had no assets; that he owed witness between \$40,000 and \$50,000, and had no property that could be reached by execution.

We think such evidence, with no contradiction, was sufficient proof that a suit against Skinner, as maker of the notes, would have been unavailing, within the meaning of the statute, and to relieve appellee from the necessity of bringing suit against Skinner, the maker, before recovery could be had against the indorser.

We think we have taken notice of all the objections that appellant has made to the judgment, and discovering no error, the judgment will be affirmed.

Sigmund Eibenschutz v. Emil C. Wetten.

1. CONTRACTS—*Construction of—Intention.*—As between the parties to a contract the intention governs in the construction of the same.

Voluntary Assignments.—Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

BERNHARDT J. FRANK and P. O'NEIL BYRNE, attorneys for appellant.

CRATTY BROS., GRAY, MACLAREN, JARVIS & CLEVELAND, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee is the assignee for the benefit of creditors of Abe Fink, administering the assets under the direction of the County Court. The assignment was made January 21, 1896.

About six months before that date the appellant and Fink had made an agreement as follows:

“Agreement between Mr. S. Eibenschutz and Abe Fink, located in Chicago, Cook county.

I, Abe Fink, declare that Mr. Sigmund Eibenschutz is entitled to one-half of profits after deducting expenses of all sales of my business located at _____. Should I, Fink, find business profitable, I declare to invest \$1,500 (fifteen hundred dollars) on the 1st of October, 1895, or before—otherwise I have the right to close out the stock at any time; at present I have to invest five hundred dollars.

I, Sigmund Eibenschutz, agree to do the buying and selling to my best ability. Both parties have the right to draw every week the profits after deducting the expense.

ABE FINK.

S. EIBENSCHUTZ.

Chicago, July 24, 1895."

January 25, 1896, appellant filed in the County Court a petition, the object of which, we will assume—though how it was to be done is not very clear—was to get the assets under the control of a court of chancery, winding up the partnership which the appellant claimed was created by his agreement with Fink.

We regard that agreement as one for compensation for services, not of partnership. It contains no hint that Fink intended to part with any interest in his property, and even if it created a partnership in profits, the stock was Fink's still, as there is no allegation that any undivided profits had accumulated.

The agreement contemplated that all profits would be divided every week, so that Fink would never have more than the equivalent of his investment. This is not a case involving the rights of a third party, as in *Illingworth v. Parker*, 62 Ill. App. 650.

The question here is, what did the parties themselves intend, and it is not possible to believe that either of them supposed that Fink was giving to the appellant any property in the stock Fink had or would have. Between themselves their intention governs. *Bushnell v. Consolidated Ice Machine Co.*, 138 Ill. 67; *Grinton v. Strong*, 148 Ill. 587.

This view of the case makes it unnecessary to consider the sufficiency of the clerk's certificate to the record.

The order dismissing the petition is affirmed.

Neagle v. Herbert.

64 619
70 23

John F. Neagle v. M. E. Herbert, for use American Radiator Co.

1. PLEADING—*Special and Common Counts.*—Common counts are appropriate only when the defendant has received, in some form, the equivalent of the money which he is called upon to pay. But when his obligation to pay rests only upon his non-performance of his promise, however good the consideration for the promise, the declaration must be special. On the other hand, however special the contract, not under seal (and under the statute perhaps if it is), if the plaintiff has performed it and the defendant received the benefit under it for his own use, in general, some common count will suffice.

Assumpsit, upon a contract to put steam heating into a building. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

FRANK REYNOLDS, attorney for appellant, contended that the court erred in permitting appellant to introduce in evidence the written contract on page 29 of the record, abstract 13, and the architect's certificate on page 28 of the record, abstract 20, for the reason that under the rules of pleading these instruments were not admissible in evidence under the common counts.

As was said in the case of *Myers v. Phillips*, 72 Ill. 460, “The second count is for money had to the use of the defendant, for money due on account stated and for money loaned. This instrument was not admissible in evidence, as it is not a note for the unconditional payment of money and no other instrument is admissible under the money counts.”

The architect's certificate was not admissible in evidence under the common counts. “Where the matter to be performed is a condition precedent, performance of that matter must be shown in the declaration, although the third person was to do an act; as, where fire policies require that ministers should certify as to the plaintiff's character, it is held that a certificate by these persons was indispensable.” 1 Chitty Pl. 323, 325.

There being no allegation whatever in the declaration that the plaintiff bases his action upon the contract offered in evidence, and no allegation that he received the certificate in accordance with the terms of that contract, both the contract and certificate were not admissible in evidence. The common counts, in an action of *assumpsit*, are founded on the express or implied promise to pay money in consideration of a precedent and existing debt in which the consideration must have been executed and not executory. 1 Chitty Pl. 340.

Where a party agrees to perform work to the entire satisfaction of the defendant and third persons, in an action to recover the price, it must be averred that the work was done to the satisfaction of such third persons. *Butler v. Tucker*, 24 Wendell 447; 1 Chitty Pl. 312.

"Where, by the proposals of the insurance company against fire, it was stipulated that the person should, in case of loss by fire, procure the certificate of the minister, etc., of the parish, importing that they know that the assured, etc., it was held that the procuring of such a certificate was condition precedent to the right of the assured to recover, and although it was found by the verdict that the ministers refused to sign the certificate, yet, as it was not averred in the declaration that the certificate was actually obtained, the judgment was arrested." 1 Chitty Pl. 323.

MARSTON, AUGUR & TUTTLE, attorneys for appellee.

When a building contract provides that payments shall be made upon architect's certificates, his certificate issued under the contract is decisive as to the amount and quality of work done. In the absence of any showing of fraud or mistake on his part, his decision, reduced to writing and signed by him, is the substantial act which determines the right of the plaintiff to the money and the obligation of the defendant to pay. *Arnold v. Bournique*, 144 Ill. 132; *McAuley v. Carter*, 22 Ill. 53; *Lull v. Korf*, 84 Ill. 225.

Where, in an action of *assumpsit* upon a contract, there remains nothing for the plaintiff to do, a declaration under

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the common counts is sufficient. *Combs v. Steele*, 80 Ill. 101; *Grand Lodge, etc., v. Cramer*, 60 Ill. App. 212.

A recovery can be had on an architect's certificate under the common counts. *Galbraith v. Chicago Architectural Iron Wks.*, 50 Ill. App. 248; *Fowler v. Deakman*, 84 Ill. 130; *Stewart v. Carbray*, 59 Ill. App. 397.

Such judgments have been sustained in *Hennessy v. Metzger*, 152 Ill. 505; *Gilmore v. Courtney*, 158 Ill. 432; *Frost v. Rand, McNally & Co.*, 51 Ill. App. 276.

Where a party files points in writing specifying the ground for a motion for a new trial, he will be confined in the Appellate Court to the reasons so specified in the court below, and will be held to have waived all causes for new trial not set forth in his written grounds. *Ottawa, etc., R. R. v. McMath*, 91 Ill. 104; *Hintz v. Graupner*, 138 Ill. 158; *Hayes v. Hambell*, 62 Ill. App. 654.

Exhibits written on sheets succeeding the signature of the judge, instead of being incorporated into the bill of exceptions, constitute no part thereof. *Harris v. Brain*, 33 Ill. App. 510.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The parties made a contract that the appellee would put the "steam-heating" into a building, and that the appellant would pay "on the 15th day of each month as the work progresses" * * * "upon the presentation of certificates signed by" the architect.

February 18, 1893, a certificate for \$2,000 was issued to the appellee, which was by him delivered to a creditor, who presented it to the appellant, who paid \$1,000 upon it and no more. The appellee sued for the other \$1,000, as we infer, and recovered judgment for some sum, though the abstract does not state what the verdict was, nor any judgment. As to the declaration the abstract only says "common counts."

The only point made by the opening brief of the appellant, and therefore the only one upon which he can insist

(McDonald v. Logi, 145 Ill. 487), is, that money so claimed under a certificate can be recovered only under special pleading, and not under any common count. To sustain this position is cited *Myers v. Phillips*, 72 Ill. 460—a peculiar case of a contract against getting drunk, not in point here either as to facts or principles of law. In *Butler v. Tucker*, 24 Wend. 447, the money was claimed under an agreement under seal. The suit was covenant; could not have been assumpsit. 1 Ch. Pl. 91, Ed. 1828.

Insurance cases cited are foreign to the subject; an insurance company does not owe for something it has received but for which it undertook to do if some event happened. As was said in an insurance case, mutually benevolent, "Common counts are added, but they are useless. They are appropriate only when the defendant has received, in some form, the equivalent of the money which he is called upon to pay. When his obligation to pay rests only upon his non-performance of his promise, however good the consideration for the promise, the declaration must be special. On the other hand, however special the contract, not under seal (and under the statute perhaps if it is), if the plaintiff has performed it, and the defendant received under it the benefit for his own use, in general, some common count will suffice." *Zjednoczenie v. Sadecki*, 41 Ill. App. 329; and so in 1 Ch. Pl. 303, Ed. 1828; *Gottschalk v. Smith*, 54 Ill. App. 341; 156 Ill. 377.

No authority is cited, nor can any good reason be given, why a count for work, labor and services is not as applicable to the first, or an intermediate, installment, payable upon an architect's certificate, as it would be to the last. It was never suggested that a common count for use and occupation for rent already accrued, could not be maintained until the end of the term.

The judgment is affirmed.

**Chicago & Alton Railroad Company v. Timothy O'Neil,
Administrator of the Estate of Ellen O'Neil.**

1. NEGLIGENCE—*What is—Moving Cars.*—A “kicked” car moving along a track at night, without a light upon it, or any one to control its movements, is negligence.

2. SAME—*Cars Moving Without Lights.*—A “switched” car moving along a track is a “running” car within the meaning of an ordinance providing that “every locomotive engine, railroad car, or train of cars, running in the night time, shall have and keep, while so running, a brilliant and conspicuous light on the forward end of such locomotive engine, car, or train of cars.”

3. WORDS AND PHRASES—“*Switched Car*” and “*Running Car*.”—Under an ordinance providing that every locomotive engine, railroad car, or train of cars, running in the night time, shall have and keep, while so running, a brilliant and conspicuous light on the forward end of such locomotive engine, car or train of cars, a “switched” car moving on a track is a “running car.”

4. SAME—“*Forward End of a Car.*”—The forward end of a car moving along a track is that end which is presented to a person approaching in a direction opposite to the line of movement of the car.

5. ERROR—*Will Not Always Reverse.*—An unimportant error will not be sufficient to reverse a judgment where the right to recover is clear.

Trespass on the Case.—Death resulting from negligence. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

STATEMENT OF THE CASE.

This is an action on the case for injury resulting in the death of Ellen O'Neil, plaintiff's intestate, on the 19th of January, 1892.

The deceased, while walking south near one of the side tracks of the Union Stock Yards and Transit Company, at a point about twenty feet south of 43d street, was struck by a car and received the injuries from which she died.

The acts of negligence alleged are as follows:

1. The method of switching employed, namely, loosing the cars from the locomotive, and allowing them so to run by their own momentum.

2. Permitting the door of the car, which struck the deceased, to swing open.

3. Failure to have a man upon the car to regulate and control it.

4. Non-compliance with the ordinance of the city of Chicago, requiring every locomotive or train of cars, which should be backing in the night time, to have a conspicuous light upon the rear car to show the direction in which such car was moving.

5. Excessive speed of train.

Some of the counts allege that the place of the accident was upon the "continuation of Loomis street in the city of Chicago, said place being a public place." Other counts aver that the defendant had invited the public to the place of the accident. Others allege that it had been customary for a long time before the accident for hundreds of employes of the various business houses in that vicinity to pass upon and along the tracks, going to and returning from their work to their homes, and that the defendant company knew that many persons were passing upon and along such tracks at the time and place of the accident.

The general direction of the tracks of the Union Stock Yards and Transit Company at the place of the accident is north and south. Forty-third street, running east and west, crosses the tracks. Just north of 43d street and west of the tracks is one of the buildings used by Nelson Morris & Company, and south of such street and west of the tracks is what is known as the Nelson Morris beef house. East of this last building and adjoining it is a platform, along the outer side of which there is a track of the Union Stock Yards and Transit Company. On the night of the accident the deceased left the packing house north of 43d street, by way of the east door, and went out upon 43d street. She then turned south from the north side of 43d street, and had gone beyond the south line of 43d street when the accident happened. The only eye witness to the accident, who testified, was Sarah Corbett, introduced on behalf of the plaintiff. Mrs. Corbett stated that she and the plaintiff

were going down the track in a southerly direction, at about a quarter of six on the 19th of January, 1892; that there were four or five cars north of 43d street on the stock yards tracks, one of which, a refrigerator car, was switched off to the south of 43d street; that as the car which was switched off came down the track, the deceased stepped to the west of the car, and was caught between the door, which was open at the time, and the platform of the beef house; that there was a lady with the deceased, who stepped to the left, or east, of the car at the same time. Mrs. O'Neil, the deceased, walked about twenty feet on the track before she was struck. There was no man upon the car to control it, and there was no light upon the car.

Witness could not say how fast the car was running. Mrs. O'Neil was struck about twenty feet south of 43d street. There was sufficient room between the platform and the track, with a moving car upon it, for a person to walk in safety. Mrs. O'Neil had been employed at the same place for about six months before the accident. Witness had often passed between cars standing upon the track in question and the platform when the door was not open. Cars were frequently switched at that point, and at that time of the night, and she had never noticed any light upon such cars. There was ample room to walk between the tracks without any danger of coming in contact with the train. Deceased could also have walked west to Ashland avenue without any danger. The car stopped just as it struck the deceased, and seems to have been switched only to that point. Witness saw the open door after the car struck deceased. The exact manner of the accident is perhaps best described in the direct examination of this witness, as follows:

“Q. And she (the deceased) stepped off the track as she saw the car coming, did she? A. Yes.

Q. And she stepped off the track to get out of the way of it? A. To the right hand side, yes.

Q. The other woman stepped to the left hand side? A. Yes.

Q. But this door being open she was caught between the door and the platform of the beef house? A. Yes, sir.

Q. That is the way she came to her death? A. Yes, sir."

FRANK O. LOWDEN and ROBERT MATHER, attorneys for appellant.

P. O'NEIL BYRNE and M. E. AMES, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The deceased was killed by a car moving on a track described by one witness as "Nelson Morris beef house track." Appellant contends that the track belonged to the Union Stock Yards Co., upon which track appellant ran its cars by agreement with the Stock Yards Co. Granted that the contention of appellant in this regard is correct, and it does not follow that the deceased was, at the time she was struck, a trespasser. She was employed in the packing house of Nelson Morris. That hundreds of employes were in the daily habit of walking on the tracks at "quitting time," the hour she was injured, is undisputed. The deceased had by acquiescence, if not otherwise, a right to be where she was when injured. There is nothing tending to show that the agreement under which appellant used this track was so exclusive as to debar the Stock Yards Co. from giving to the deceased and other employes of packing houses in that vicinity, permission to walk to and from their homes on or beside these tracks, nor is it shown that the place on which, beside the track, she was standing when struck, was the property in any way of either the appellant or the Stock Yards Co. The evidence is not that the deceased was killed because she was walking upon the tracks, or solely because appellant "kicked" a car along the track without a light upon it or any one to control its movements. Nor was the deceased killed because the car was operated in the same manner that for months previous it had been customary to operate cars

upon this track; for the testimony that the car was run as for months had been usual, can not, in the absence of any direct evidence to that effect, be held to mean more than that so far as sending the car off by itself, with no light and no person thereon was concerned, it was operated in the customary manner.

The deceased was struck and killed by appellant's car because the swinging door thereon was negligently left open; by this door she was struck and killed.

The deceased saw the car coming, and stepped off the track to get out of its way; in the language of Mrs. Corbett:

“Q. But this door being open, she was caught between the door and the platform of the beef house? A. Yes, sir.

Q. That is the way she came to her death? A. Yes, sir.”

There was sufficient room between this platform and the moving car for a person to walk in safety, provided a swinging door of the car was not open; with it open, the place was, to one walking beside the track, who thought the car to be an ordinary one with closed doors, a veritable death trap.

At the hour when the deceased was killed, with hundreds of employees of the packing houses going to their homes, to have knowingly “kicked” a car along this track, with no person in control of the same, and with an open door projecting therefrom, would have been willful disregard of the safety of persons walking along the tracks.

We must treat the evidence that for six months previous the same method of switching cars had been employed, as not including the projecting door, as it fairly may be treated, or we must regard the conduct of appellant as amounting to wanton negligence.

It may be, perhaps must be, inferred from the evidence, that the deceased knew that appellant was in the habit of shoving cars along this track, but she also knew that there was between a moving car thereon and the platform of the

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beef house, room for her to walk in safety; while there is no evidence that she knew that cars were sent along with swinging doors projecting therefrom.

Complaint is made that appellee was allowed to introduce the following ordinance:

“Every locomotive engine, railroad car or train of cars running in the night time, on any railroad track in said city, shall have and keep, while so running, a brilliant and conspicuous light on the forward end of such locomotive engine, car or train of cars. If such engine or train be backing, it shall have a conspicuous light in the rear car or engine, so as to show in the direction said car is moving.”

It is urged that this does not apply to a single car, and a remark of this court, made in L. S. & M. S. Ry. Co., 33 Ill. App. 145, “that an engine is not a passenger train,” is cited. The statement is quite correct, but a railroad car is such a car as was run in the present case. The ordinance does not say that it shall not apply to a disconnected car. It is clear that a “switched” car moving along a track is a “running car,” and that the forward end of such car is that which is presented to a person approaching in a direction opposite to the line of movement of the car.

We do not hold that the record here presented is free from error, but we regard the right of appellee to recover as clear, and the damages awarded as not excessive.

The judgment of the Circuit Court is affirmed.

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West Chicago Street Railroad Co. v. John I. Sullivan, by his Next Friend, Michael J. Sullivan.

1. NEGLIGENCE AND ORDINARY CARE—*Questions for Jury.*—The questions of negligence and exercise of ordinary care, including such care as is to be expected from a child of the age of eight years, are for the determination of the jury.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

West Chicago St. R. R. Co. v. Sullivan.

STATEMENT OF THE CASE.

This is an action by John I. Sullivan, in the name of his next friend, Michael J. Sullivan, to recover damages for personal injuries alleged to have been sustained through the negligence of the West Chicago Street Railroad Company. The declaration alleges that on February 4, 1892, the defendant operated a line of horse cars on Van Buren street, in the city of Chicago, and that the plaintiff, a boy eight years of age, was traveling north on Aberdeen street, at the intersection of that street with Van Buren street; that it then and there became the duty of the defendant's servants to so manage said car as to enable the plaintiff to cross Van Buren street, and to use due care and diligence to avoid coming into collision with the plaintiff as he was in the act of crossing Van Buren street; that the defendant did not observe its duty in the premises, and negligently failed to observe the plaintiff as he was in the act of crossing Van Buren street, and drove its horses at a rapid speed, whereby the plaintiff was thrown with great violence to the ground, and dragged a long distance, and sustained such injury to one of his arms that it was thereafter amputated. At the trial the jury returned a verdict in favor of the plaintiff, and assessed his damages at the sum of \$8,000. Judgment having been entered upon this verdict, the defendant appeals.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

SCANLAN, MCGAFFEY & MASTERS, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

In this action it appeared that February 4, 1892, the plaintiff, then eight years of age, running north on Aberdeen street, at the crossing of that street with Van Buren, ran into, or was struck by, the forward part of one of a pair of horses going eastward and drawing a street car belonging to appellant.

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As a consequence of the collision, the plaintiff was run over by the car, and one of his arms was so injured as to necessitate its amputation.

From a reading of the record here presented, it seems to us that the accident was not the result of any negligence on the part of appellant, unless it be negligence for it to drive at a trot its car horses over a street crossing, or negligence for it to fail to have a fender upon each of its cars that will prevent one from being run over by any of them.

The question of negligence of the defendant was one for the jury to pass upon, as was also the question of the exercise of ordinary care by the plaintiff, that is, such care as is to be expected from one of his age and intelligence. Two juries have passed upon these matters, with the result, in each case, of a finding for the plaintiff. We see no reason for thinking that, considering the parties, a boy who has lost an arm, on the one side, and a great and wealthy corporation on the other, a third jury would arrive at any different result. The evidence is not such that we feel warranted in saying that there is such a preponderance in favor of the defendant that we ought to reverse the judgment rendered.

The remarks of counsel for plaintiff, while drawing an unfair inference, were not such as require action on our part in respect thereto.

The judgment of the Superior Court is affirmed.

Hickox and Read Publishing Company v. Dawes Manufacturing Co.

1. **ADMISSIONS—Corporate Character.**—Where a party litigant deals with his adversary as a corporation, he admits its corporate character.

2. **OBJECTIONS—To be Made in Apt Time.**—After a cause has been placed upon the short cause calendar and continued on motion of one of the parties, objections to depositions on the ground that the evidence is secondary, came too late.

Hickox and Read Pub. Co. v. Dawes Mfg. Co.

Assumpsit, for goods sold. Appeal from the Circuit Court of Cook County; the Hon **EDWARD F. DUNNE**, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

E. A. SHERBURNE, attorney for appellant.

PADEN & GRIDLEY, and **CARLOS S. ANDREWS**, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This record indicates, without expressly stating, that the appellant is a Chicago, and the appellee a Pittsburgh house.

The cause was on the "short cause calendar," May 27, 1895, and was then, on motion of the appellant, continued one week. Two days afterward the appellant moved to suppress depositions on file. Some portions were suppressed, and the residue constituted the whole evidence in the cause.

The appellant now says that the "principal vice of the evidence" in the depositions is that it is secondary, without accounting for the primary; "and also mere assertions and legal conclusions of the witness." This last phrase we understand to be pointed at the statement by a witness that the appellee was "a corporation organized and existing under the laws of the State of Pennsylvania."

As the appellant dealt with the appellee as a corporation, the corporate character was, at least, admitted. *Ramsie v. Peoria, M. & F. Ins. Co.*, 55 Ill. 311; *Lombard v. Chicago Sinai Congregation*, 64 Ill. 467.

Objection that the evidence was secondary was too late, when the case had been called for trial and postponed at the instance of the appellant. *Cooke v. Orne*, 37 Ill. 186; *Kassing v. Mortimer*, 80 Ill. 602.

W. C. Hickox seems to have been president and treasurer of the appellant, and in one letter to the appellee about the business to which the suit relates, in reply to one to the appellant from the appellee, the signature was W. C. Hickox & Co. This was manifestly a mere blunder.

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The supposed defense of payment rests upon an ambiguous letter from a third person. The appellant seems to be at home here, and had it had any merits, could no doubt have proved them, but rested upon the ingenuity of its counsel. The judgment is affirmed.

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187 360

Illinois Terra Cotta Lumber Co. v. W. B. Owen.

1. **SALES—Where Made.**—A person who resided and did business at Hobart, Indiana, received at that place an order by mail, for goods, from a party residing and doing business in Chicago, Illinois, which he accepted in Indiana, and filled by delivering the goods free on board cars at Hobart, Indiana, consigned to purchaser at Chicago. This was held to be a sale in Indiana, at the place where the orders were accepted, and the minds of the parties met.

Assumpsit, upon a contract in writing. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

CRATTY BROS., GRAY, MACLAREN, JARVIS & CLEVELAND, attorneys for appellant.

In the construction of the contract sued on, we invoke the following rules:

The subject-matter of the contract is to be fully considered. 2 Parsons on Contracts (7th Ed.), 499.

The various provisions of the contract must be construed together, so if possible all its words shall have some effect. McCarty v. Howell, 24 Ill. 341; Schneider v. Turner, 130 Ill. 29; 1 Kinney's Digest, 547.

Each part of the contract must be construed in view of the other parts. Stout v. Whitney, 12 Ill. 218.

Force and effect should be given to all the words employed by the parties that is possible. Bowman v. Long, 89 Ill. 19.

The situation of the parties at the time, and of the property which is the subject-matter of the contract, and the intention and purpose of the parties making the contract

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should be taken into consideration. 2 Parsons on Contracts, 419.

The contract should be construed *contra proferentem*, that is, against him who gives or undertakes or enters into the obligation. 2 Parsons on Contracts (2d Ed.), 506.

Where the language is ambiguous, it should be construed most strongly against the party who uses it, regard being had, however, to the apparent intention. McCarty v. Howell, 24 Ill. 341.

Where, upon the words used, the intention is doubtful, such extrinsic facts as were in view of the parties when the contract was made, are to be considered, in order that the court may stand in the position of the parties. Doyle v. Teas, 4 Scam. 202; 1 Kinney's Digest, 208.

The word "sale" as commonly used by courts and law writers, and as legally defined, signifies a contract of sale, an executory sale, and does not necessarily mean an executed sale. 21 Am. & Eng. Enc. of Law, 446, "Definition;" same, 488, Sec. b; 634, Sec. b, "Separation and Measurement;" 635, Sec. c, "Delivery by Installments;" 636, Sec. d, "Payment," etc.; 640, Sec. 5, "By Installment;" 643, Sec. f, "Sales to Arrive;" 644, Sec. 5; Kent's Comm. (13th Ed.), *468; Dunlap v. Berry, 5 Ill. (4 Scam.) *327, *331-332; Wade v. Moffett et al., 21 Ill. 110, 111, 112; Bell v. Farrar, 41 Ill. 400, 404.

Where the contract first became binding, where the minds of the parties to the contract first met, is the place of the making of the contract or sale, though performance is to be made elsewhere. Levy v. Bohen, 4 Ga. 1; Blackman v. Jenks, 55 Barb. (N. Y.) 468; Rindskopf v. DeRuyter, 39 Mich. 1; De Costa v. Davis, 4 Zab. (24 N. J. Law) 319; Schuenfeldt v. Junkerman, 20 Fed. Rep. 357; 3 Am. & Eng. Ency. of Law, 547; Mactier & Frith, 6 Wend. (N. Y.) 103; Brisban v. Boyd, 4 Paige (N. Y.) 17; Tegleroh v. Shipman, 33 Iowa 194.

Where a proposition, made by one to another, is accepted by letter mailed, the contract becomes binding the moment the letter is posted, and the place of mailing such acceptance, is the place of the making of the contract. 3 Am. &

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Eng. Ency. of Law, 547; Vol. 21, 452 and 453, note 1; Anson on Contracts (2d Am. Ed.), 28; Addison on Contract, *861, *862; Moore v. Pierson, 6 Iowa 279; Levy v. Cohen, 4 Ga. 1; Abbott v. Shepard, 48 N. H. 14; Ferrier v. Storer, 63 Iowa 484.

FRANK P. LEFFINGWELL, attorney for appellee.

The plaintiff was not entitled to recover a verdict, for the reason that the porous tile, manufactured and sold by the defendant, was not the same production as that covered by the contract between the plaintiff and the defendant. U. S. Rev. Stat. Secs. 4886-4890.

Owen did not sell the tile within the State of Illinois. 1 Benj. Sales, Sec. 1, notes; 2 Kent (12th Ed.) 468; 2 Blackstone, 446; 1 Benj. Sales, Sec. 348 *et seq.*, *260; Dunlap v. Berry, 4 Scam. 327; Low v. Freeman, 12 Ill. 467; Pearson v. State, 66 Miss. 510; Brinker v. Scheunemann, 43 Ill. App. 659; Orcut v. Nelson, 1 Gray (Mass.) 537; McIntyre v. Parks, 3 Metc. 207; Kline v. Baker, 99 Mass. 253; Banchor v. Cilley, 38 Me. 553; Hobbie v. Jennison, 149 U. S. 355.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit brought to recover under the provisions of a certain contract, which is in part as follows:

"This article of agreement, made and entered into this May 13th, A. D. 1887, by and between the Illinois Terra Cotta Lumber Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, residing and doing business in the county of Cook, in the State of Illinois, party of the first part, and W. B. Owen, a resident of the town of Hobart, in the county of Lake, in the State of Indiana, party of the second part, witnesseth, that,

Whereas, the party of the second part is desirous of obtaining the right, privilege and immunity to sell or apply, or to sell and apply, within the State of Illinois, such pro-

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duction known as terra cotta lumber, or porous earthenware, under and in pursuance of such letters patent of the United States of America, or either of them.

Now, therefore, the party of the first part, in consideration of the payments to be made, and the covenants and agreements to be performed, as hereinafter set forth, on the part of the party of the second part, hereby bargains, sells, assigns, transfers, conveys and makes over to the party of the second part the right, privilege and immunity to sell or apply, or to sell and apply, within the State of Illinois, such production known as terra cotta lumber, or porous earthenware, during the life of the said letters patent, or either of them, or any renewal or renewals thereof, subject to the conditions hereafter contained.

In consideration of which the party of the second part, for himself, his heirs, executors, administrators and assigns, hereby covenants and agrees to, and does, acknowledge the validity of all of such letters patent, and binds himself, his heirs, executors, administrators and assigns, to not, at any time hereafter, in any manner or form, question, resist or contest the validity of such letters patent, in any court of record of the United States of America, or otherwise; also hereby further covenants and agrees that he will, at once, commence to sell or apply, or to sell and apply, or to make all reasonable efforts to sell or apply, or to sell and apply, within the State of Illinois, such production known as terra cotta lumber, or porous earthenware, and will thereafter, during the existence of this agreement, continue to sell or apply, or to sell and apply, or to make all reasonable efforts to sell or apply, or to sell and apply, within the State of Illinois, such production, known as terra cotta lumber, or porous earthenware, to the extent that his facilities and opportunities may enable him to do; that he will, at all times, keep complete and accurate books of account, showing the number of tons of such production known as terra cotta lumber, or porous earthenware, sold by him within the State of Illinois, and will, upon the last day of each and every month during the existence of this agreement, report to the party

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of the first part the number of tons of such production known as terra cotta lumber, or porous earthenware, sold or applied, or sold and applied, by him, within the State of Illinois, such month, and will, at the same time, pay to the party of the first part, one dollar (\$1) for each and every ton thereof so sold or applied, or sold and applied, by him, within the State of Illinois during such month.

In witness whereof, the party of the first part has caused this agreement to be signed by its president and attested by its secretary, with the corporate seal affixed, and the party of the second part has hereunto set his hand and seal the day and year first above written.

THE ILLINOIS TERRA COTTA LUMBER COMPANY,
By C. W. BREGA, Vice President.
W. B. OWEN.

Attest: QUIN JOHNSTONE, Secretary."

After talk in Chicago, with a Chicago party, the talk being so indefinite that it did not amount to an agreement, appellee, who resides and does business at Hobart, Indiana, there received from the Chicago party, orders sent by mail for "terra cotta lumber," which orders were in Indiana accepted and filled by delivering the materials free on board the cars at Hobart, consigned to the purchaser in Chicago.

This was clearly a sale in Indiana, the place where the orders were accepted and where the minds of the parties met.

The contracts were such that performance was to be made in Indiana. The undertaking of appellee was to deliver lumber "f. o. b." at Hobart, Indiana.

Appellee neither sold nor applied any material in Illinois. The purchaser might, had he seen fit, have sent the goods to Canada or Alaska, and there applied them.

Concerning the application of the terra cotta, appellee made no undertaking and took no action. Sales made in Indiana are not covered by the contract; it was not a license to make, sell or use in Indiana, or an agreement to pay for such making, sale or use.

The opinion of Judge Adams, before whom the cause was

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tried, sufficiently states the law applicable to the case, and is adopted. That opinion is as follows:

“The contract between the parties recites that the plaintiff is the owner of the patented invention in question within the State of Illinois, and that the patent covers the right to manufacture and sell, or to manufacture, sell, and apply, a certain production known as terra cotta lumber or porous earthenware, the composition of which is described in the contract.

The plaintiff by the contract grants to the defendant the right to sell or apply, or to sell and apply within the State of Illinois, said preparation during the life of the letters patent, or any renewal or renewals thereof.

The defendant agrees among other things that he will upon the last day of each month, during the existence of the agreement, report to the plaintiff the number of tons of such production sold or applied, or sold and applied by him, the defendant, within the State of Illinois, during such month, and will, at the same time, pay to the plaintiff one dollar for each and every ton thereof so sold or applied, or sold and applied by him within the State of Illinois during such certain month.

The defendant, by his counsel, contends that the evidence for the plaintiff does not show that the defendant either sold or applied any of the production in question within the State of Illinois.

Of course it is material to the plaintiff's case to show that he, the defendant, sold or applied some of his production within the State of Illinois.

The evidence as to the sales is as follows: Mr. Johnson, who was the general manager of the Pioneer Fire Proof Construction Company, testifies that he had a conversation with the defendant at the office of the company in Chicago, in which the prices of said production manufactured by the defendant were stated, but no amount of the production was agreed on. All that can be gathered from this witness is, that he was informed by the defendant of the price or prices at which he would sell free on board at Hobart, Indiana.

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Subsequently the Pioneer Company sent a number of orders by mail to the defendant to Hobart, Indiana, for quantities of the production to be by him delivered free on board the cars at Hobart, Indiana. The defendant, in response to these orders, delivered the material ordered free on board cars at Hobart, Indiana, consigned to the Pioneer Company, Chicago.

The defendant's counsel contends that the orders having been accepted and the material delivered at Hobart, Indiana, that place and not Chicago or Illinois, was the place of sale.

It is admitted by plaintiff's counsel that by the agreement between the Pioneer Company and the defendant, the material ordered was all to be delivered free on board at Hobart, Indiana. The orders were not for any specific lumber, but for so much lumber of a certain kind to be taken from the lumber manufactured by the defendant at Hobart, Indiana.

Do these facts show a sale within the State of Illinois? In order to entitle the plaintiff to recover there must have been an actual sale within this State. Was there such a sale?

There is a clear distinction between an executory contract for a sale, and a sale.

Benjamin on Sales, page 237: 'After a contract of sale has been formed the first question which suggests itself is, naturally, what is its effect.' * * * 'The contract is only executory when the goods have not been specified, or if, when specified, something remains to be done to them by the vendor—either to put them in different deliverable shape or to ascertain the price.'

Dunlap v. Berry, 4 Scam. 327 to 331: It is not necessary to read this whole case. Here was a sale of bricks sold by the thousand, the bricks being in the kiln of the vendor. The court say, 'the language of the third instruction is that if the bricks were sold by the thousand,' etc. (to and including the words 'virtual delivery of the lot sold').

Low v. Freeman, 12 Ill. 467: The agreement here was

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this: 'That Samuel Freeman and Richard Freeman have this day sold to William R. Low eight hundred bushels of grain,' etc. (reading to the words 'did not show a sale of the property in controversy').

These cases are read for the purpose of illustrating the distinction between an executory agreement for a sale and an actual sale, and the court go on: 'The subject-matter of contract was grain generally, and not any particular grain' (reading from *Low v. Freeman*, to the words 'delivery of grain').

38 Maine 553: It is not necessary for me to state this case or to read it in full, but certain parties were living in Maine, and a clerk of the plaintiff, clerk of the vendor, took an order from parties living in Maine for certain goods, the clerk's employer residing in Massachusetts, and the Massachusetts man accepted the order and sent on the goods, and the question was whether that was a sale in Maine or in Massachusetts. The court say: 'Until the plaintiff had consented to sell the goods and put them up and actually parted with them by selling them, he could not be regarded as having sold them, and before all that was done, he was under no obligation to part with them. When they were sent the sale was perfected, the goods being such goods as ordered, and this contract was made in Boston, which must be regarded in law as the place of purchase,' which is the same thing as saying the place of sale.

I regard the case of *Hobbie v. Jennison*, 149 U. S. Reports 355, as decisive of the question here.

It has been admitted here that the rule is substantiated as stated by the court, that is, as between the vendor and vendee, but ask to apply a different rule as between the plaintiff and this defendant.

When the question is whether there was a sale or not, I understand that the general principles of law must be applied. If it was a sale it was a sale, no matter who are the parties or what are the interests involved.

Now, in the case of *Hobbie v. Jennison*, 149 U. S. 355, it was an action between patentee, who claimed the right, and

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a party over in Detroit, Michigan; he claimed that his right had been infringed, and the court applied the same rule precisely as is applied between vendor and vendee. That case is precisely like this, with one exception. The purchaser lived in Hartford, Connecticut. He wrote to a party living in Bay City, Michigan, ordering certain goods. This party in Bay City, Michigan, had a license from the patentee to sell in Michigan. At Bay City, Michigan, he filled the orders and sent the goods on to Hartford, knowing at the time that they were intended for his use and would be used in Hartford, and the question upon which the case turned was this—and it was the only question in that case: Was this a sale in Hartford, Connecticut, or was it a sale in Michigan? And the court held that it was a sale in Michigan.

Now the fact that the party in Michigan had a license to sell there, does not materially affect the case so far as its applicability to this case is concerned, because the owner of the patent here in this suit, the plaintiff, had no rights over in Indiana, and the question whether the defendant had a right to sell there as against the patentee, is wholly immaterial to me. He can not question his right to sell in Indiana, because he has no right there himself.

With regard to the word 'apply,' I am utterly unable to conceive what the framer of the contract intended by the use of the word 'apply,' in this contract, because after the party had sold the production in the State of Illinois, anybody to whom he sold it could apply it in the State of Illinois or anywhere else. I can give no meaning except this: He might make a contract with a corporation or an individual here to put up, to place in position this material himself, and the word 'apply,' would have effect there; but still it is unnecessary in the contract, because if he should contract with an individual or corporation to put the material in place, it would be included within the terms of sale because by his contract he would be charged both for labor and material.

I am of opinion that the evidence is wholly insufficient

Sleeper & Co. v. World's Fair Banquet Hall Co.

to sustain the proposition that there was a sale within the State of Illinois. Gentlemen of the jury, you are instructed to find the issues for the defendant."

The judgment of the Circuit Court is affirmed.

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S. S. Sleeper & Co. v. World's Fair Banquet Hall Co.

1. ATTACHMENT—*Auxiliary to the Action of Assumpsit.*—Proceedings by attachment, though original, are yet in legal effect only auxiliary to the action.

2. PLEADINGS—*Contracts and Promises.*—A declaration upon a contract containing promises of performance, and which fails to state to whom such promises were made, is insufficient.

3. PRACTICE—*Joint Actions.*—A joint action against two, can not be sustained upon separate contracts by each.

Assumpsit, on contracts. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11. 1896.

C. A. PARKS and McCARTNEY & GIDDINGS, attorneys for appellants.

MOSES, PAM & KENNEDY, attorneys for appellees.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellants are partners, and we follow the irregular practice of the parties here in using the firm name, instead of pursuing the course laid down by Chitty, 1 Ch. Pl. 230, Ed. 1888.

The appellants were plaintiffs, and sued the appellees by attachment. Much of the abstract and briefs is occupied with the proceedings at the circuit on the attachment, but which do not concern us on this appeal, because, the action itself being misconceived, no errors upon the attachment, which, though original, is yet in legal effect only auxiliary to the action of assumpsit, are now material. Columbian Hard Wood Lumber Co. v. Langley, 51 Ill. App. 100.

The action is against one John H. Morris and the Banquet Hall Company joined as defendants, and while the declaration undertakes to show contracts by each of the defendants with the plaintiffs, there is no hint of any contract by the defendants jointly.

The declaration sets out two written contracts with Morris, and alleges the payment to Morris by the plaintiffs of money thereunder; that Morris delivered the contracts and money to the Banquet Hall Company, which accepted the contracts and promised to perform them. To whom that promise was made the declaration does not state.

The case cited and those therein referred to are conclusive. See also 1 Ch. Pl. 34, Ed. 1828.

The plaintiffs withdrew all of their declarations except one special count, and to that the court rightly sustained a demurrer. The plaintiffs stood by the count, and final judgment was entered for the defendants, which is affirmed.

Illinois Steel Company v. Thomas Szutenbach.

1. **ORDINARY CARE—Depends upon Surrounding Circumstances.**—Ordinary care depends upon the circumstances under which such conduct is required. It is the duty of a person approaching a railroad crossing to look out and make use of his senses, to determine whether it is safe for him to cross.

2. **SAME—Approaching Railroad Crossings.**—There is a distinction as to the nature of railroad crossings. Where one approaches a single track used only for switching and yard purposes upon which a few freight cars are standing to which no engine is attached, it would be unnatural for him to conclude that to attempt to pass over, by the end of one of the cars, would be dangerous, and the court can not say that in such case a reasonably prudent man would not assume that to pass over was reasonably safe.

3. **PLEADING—Allegations not Necessary to Prove.**—Where an allegation of a declaration amounts to a mere statement that it was necessary for the plaintiff to cross a certain railroad track, the purpose for which he was crossing the same is immaterial.

4. **LIMITATIONS—As to Amendments.**—Where allegations are introduced into a declaration in an action for personal injuries, more

Illinois Steel Co. v. Szuttenbach.

than two years after the cause of action accrued, if the gist of the action remains the same, a plea of the statute of limitations is inapplicable.

5. **DAMAGES—Duty of the Jury.**—It is the duty of the jury in a case for personal injuries to give the plaintiff such damages as appears from evidence he has clearly suffered, resulting from the defendant's negligence, although they may not be able to give adequate compensation for the entire injury, when some portion of it in their judgment is the result of a failure to adopt reasonable or ordinary measures to lessen or mitigate the result of the injury.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

WILLIAMS, HOLT & WHEELER, and E. PARMALEE PRENTICE, attorneys for appellant.

KAVANAGH & O'DONNELL, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action based upon the alleged negligence of appellant, on account of which, it is said, appellee received severe injuries, for which he has recovered a judgment for \$8,500.

Appellee was, in July, 1892, working for Dolese & Shepard, paving contractors, at the Illinois Steel Company's yard. His business was shoveling cinders as they came out of the furnaces, and loading them into wagons.

It was the custom of the men thus engaged, to, when so inclined, leave their work once during the forenoon and once during the afternoon, to go to Ashland avenue for beer.

In order to reach Ashland avenue from the place where appellee was working, he had either to go upon a plank roadway, which ran first in a northwesterly direction alongside the railroad tracks, then turned to the west, crossing three tracks, then turned to the south until it reached a plank crossing running directly west over one railroad track to a gate which led into Mill street, running to Ashland avenue; or, appellee could have gone from where he worked directly

west, over some seven or eight railroad tracks to the plank walk running west, over which ran one railroad track. By going directly west from where he was working, the distance to the plank walk that ran directly west, was about one-third what it would be to follow the plank roadway by which it was designed people should go from the place where appellee was working to the gateway leading into Mill street.

Two of the principal questions in dispute in this case, and concerning which there is contradictory evidence, are as to whether appellee and his companions in going toward Mill street followed the long distance round, by way of the plank roadway, or, disregarding it, walked westwardly directly across the railroad tracks; and also as to whether appellee was injured when on the track which ran over the plank walk that led directly west into Mill street, said plank walk being about fifty feet in length, or was injured at the railroad track, about fifty feet east from the east end of the fifty-foot plank walk running east and west, leading into Mill street.

As is manifest, if he was injured while upon the railroad track that ran from the fifty-foot plank walk, connecting with Mill street, he was injured while upon a crossing made for the use of teams and pedestrians; while if he was injured when on the track some seventy-five feet east of this, he was hurt at a place not designed for any one to cross or be, except when engaged in the service of the railroad company and about its business.

As to these matters, concerning which is the chief contention in respect to the facts, while we should have been better satisfied if the conclusion of the court and jury before whom this case was tried had been other than it was, we do not find in this regard any such preponderance of evidence in favor of the appellant as would warrant us in reversing the action of the court below. The verdict of the jury in this case comes to us sanctioned by the action of the judge before whom the case was tried; he saw and heard the witnesses, and therefore had an opportunity of judging as to

what the truth in respect to these matters is that we do not possess.

It is urged that the appellee failed to show that he was in the exercise of ordinary care at the time of the accident. If appellant's view of the facts is the true one, then the appellee did not exercise ordinary care; but if the conclusion of the jury as to the facts is correct, then we have only to consider what ordinary care at such a time and such a place requires, and whether the jury were warranted in finding as they did.

What is ordinary care depends upon the circumstances under which such conduct is required. It undoubtedly is the rule in this State that it is the duty of a person approaching a railroad crossing to look out—make use of his senses to determine whether it is safe for him to cross. There is, however, a great distinction as to the nature of railroad crossings. Where one approaches a single track, used only for switching and yard purposes, upon which a few freight cars are standing, to which no engine is attached, it would be unnatural for him to conclude that to attempt to pass over this crossing by the end of one of the cars would be dangerous; and we are unable to say that in such case a reasonably prudent man would not do as appellee apparently did—assume that to pass over was reasonably safe.

Appellant also urges that the appellee having alleged in his declaration that it became necessary for him to cross a certain railroad track, it was incumbent upon him to prove the existence of such necessity, and that by this is meant, not the mere wish upon the part of the appellee, but a compulsion, or compelling force, existing as to his actions, which he could not reasonably resist.

We do not regard the allegation of the appellee's declaration in this regard as amounting to more than a statement that, for the purpose of accomplishing some lawful design upon his part, it was necessary that he should pass over the railroad track in question. However unwise or immoral in the view of many people it may have been for the appellee, upon that hot July forenoon, to go for a drink of beer, it

was something which he had a lawful right to do, and having such lawful right and desire, whatever he had to do in order to accomplish his wish, was, within the meaning of the declaration, necessary; that is to say, the meaning of the declaration is that in order to get the beer he wished for, it was necessary that he should cross this track—not that it was necessary he should have the beer.

We do not think the statute of limitations applicable to the allegations of injury to the appellee's mind and memory, which were introduced into the declaration more than two years after the action was begun. The gist of an action based upon breach of duty is the negligence, and not the consequent injury resulting therefrom. *Wood on Limitations*, 1st Ed., Sec. 179.

It is quite manifest appellee has not two separate causes of action for the one act of negligence; that is, he could not have maintained one action based upon the negligence of appellant and the loss of his foot, and another based upon the negligence of appellant and the injury to his head.

Whether the injury to appellee's head was known to him or to his counsel at the time the first declaration was filed is immaterial. If such injury is the result of appellant's negligence, the appellee is entitled to recover not only for all the loss he has suffered up to the time of trial, but for prospective pain and suffering he may endure after trial; and at what time a specification of injuries consequent upon the negligence of appellant was introduced into the declaration is immaterial, so far as the statute of limitations is concerned. What appellee introduced into his declaration by the amendment, concerning his mental impairment, was not a statement of a new cause of action, or, indeed, strictly of a new injury, but rather of an additional consequence of an injury and negligence before declared upon.

It is also urged by appellant that the following instruction, by it asked, should have been given:

"If you believe from the evidence that the plaintiff neglected or refused to permit or adopt reasonable and ordinary measures to lessen or mitigate the results of the injuries re-

ceived by him, and if you shall believe from the evidence that his present condition is not entirely the natural or necessary result of said injuries, but is the result in a greater or less degree, of the lack of ordinary and reasonable care by the plaintiff to adopt said measures, then if you bring in a verdict against the defendant, you should add nothing in such verdict for anything in plaintiff's present condition which would have been prevented by said measures; and if you are unable to ascertain from the evidence, any guide or way to separate the items and elements of damage which came from the alleged negligence of defendant, and which, if any, came from the acts or the omissions of the plaintiff to use said ordinary and reasonable measures, if there were such acts or omissions, then your verdict should not include more than nominal damage to be charged upon the Steel company."

The appellee had, in the view of the jury, been severely injured in consequence of the negligence of the appellant.

The appellant's foreman testified that the doctor to whom appellee was taken by such foreman, said that appellee's foot was "hurt pretty bad," and that he, the doctor, thought that appellee would have to have it taken off. Here was evidence warranting, in the view of the jury, the giving of substantial damage, and under which we do not think the jury should have been instructed that if they were unable to ascertain from the evidence any guide or way to separate the items and elements of damage which came from the alleged negligence of appellant, from those, if any, which came from the acts or the omissions of the appellee to use ordinary or reasonable measures, that their verdict should not include more than nominal damage to be charged upon the Steel company.

It was the duty of the jury, under their view of the evidence, to give to the appellee such damages as he had clearly suffered, or as they believed from the evidence he had suffered solely as a result of the appellant's negligence, although they might not be able to give to the appellee adequate compensation for the entire injury that had come to him, some portion of such injury being, in their judgment, the result

of his failure to adopt reasonable and ordinary measures to lessen or mitigate the results of the hurt received by him.

There are, in our opinion, as is urged, suspicious circumstances attending the testimony and conduct of the witness, Grzeskowiak, but not such as call for a reversal of this judgment. The circumstances attending the testimony of this witness, like others which we have mentioned, were presented to the judge who tried the cause, and we do not feel justified in interfering with his conclusions.

We do not regard the testimony of the witness Sprys as an impeachment of the witness Grzeskowiak, but as a contradiction of him upon a material and not unimportant point.

The accident in this case happened, like many others to which our attention has been called, from the practice of "kicking" cars in a railroad yard. The verdict of the jury was such as might have been expected when a poor laborer brings suit against a great corporation.

As before indicated, we do not feel confident that under the real facts the appellant should have had this judgment rendered against it; nevertheless we are not prepared to say that, taking its own statement as true, it was entirely free from blame. Nor do we think there is any reason for believing that another trial would bring about a result substantially variant from that arrived at in the one already had.

The judgment of the Superior Court is affirmed.

Union Investment Association v. David S. Geer.

Same v. Same.

1. **CORPORATIONS—Vice-President as Agent**—The vice-president of a corporation may act as its agent, and if he is by it so recognized and treated or held out to the world, his acts, within the scope of the authority given to him, are as binding as those of any other agent.

2. **ESTOPPEL—By the Conduct of a Party.**—Where a party so conducts himself as to lead others reasonably to believe that a person is his

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agent, such party will not be permitted to deny the existence of the relation he has induced others to believe existed.

8. TENDER—*When Unnecessary.*—Where a party owing an installment on a bond is told that his bond is forfeited, and that no further payments will be received from him, he is relieved from the necessity of making further tenders of payment.

Assumpsit, for money had and received. Appeals from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 11, 1896.

STATEMENT OF THE CASE.

The suit last named is based upon certificate 84 of the Tontine Bond and Investment Association, the bond being dated January 1, 1891. The suit was brought before a justice of the peace; judgment was rendered there for \$120. The case was then appealed to the County Court. The material parts of the bond sued on are as follows:

“No. 84. \$500.

TONTINE BOND INVESTMENT ASSOCIATION.

This bond is issued to David S. Geer, subject to its terms and those of the application therefor. It will be due and redeemed when all lower numbered bonds have been paid or lapsed and the redemption fund equals its redemption value, as shown on the back hereof. * * *

The failure to pay monthly dues herein in advance, without notice, on or before the last day of each month, will forfeit this bond and all payments made.”

Upon the back of the bond is indorsed:

“Payment for and redemption of bonds shall be as follows:

SCHEDULE OF PAYMENTS, SERIES C.

Amount of Bond.	Entrance Fee.	Monthly Dues.
\$500.00	\$7.00	\$2.00.”

The redemption value of C series being \$50 for the first year, and increasing by the sum of \$50 for each year for the period of ten years until the face amount of the bond is reached.

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It appears from the testimony that appellee, in January, 1891, was solicited by one Z. L. Tidball, who was then the vice-president of the defendant company, to purchase some bonds of the character set forth, of the defendant association. That he gave to Captain Tidball at the time of the purchase the sum of \$27.94, which he said was the cost of the bond, and a day or two afterward received from Mr. Tidball's hands the bonds. It also appears at the time of the purchase of these bonds a written application was made therefor, and signed by Mr. Geer, the face of which application is as follows:

“ APPLICATION FOR BOND.

TONTINE BOND INVESTMENT ASSOCIATION,
89 Madison Street, Chicago, Ill.

I hereby apply for six bonds in Series 'C.' I am aware that the monthly dues are due on the 1st day of each month, and they must, without notice, be paid in advance on or before the last day of the preceding month while the bond continues in force. I agree to pay the monthly dues in advance on or before the last day of each month hereafter, without notice, under penalty of forfeiture of my bond or bonds and all payments made thereon; if I do not, I agree to abide by and comply with the terms of this application and the bond or bonds issued to me.

DAVID S. GEER,
Address, Tacoma Building.”

And at same time of the issuing of said bonds, a pass or receipt book was issued by the defendant company, at the top of which it says:

“ The dues for the second month are payable in advance on or before the last day of the month in which your bond is issued, and on or before the last day of each succeeding month.

“ Pay your dues in advance or early in the month and avoid the risk of lapse or the rush on the last day.”

Then follows the receipt showing the receipts of the money by J. Dempsey, John P. Anderson and George Hampson down to and including August 31, 1892.

It further appears that on March 31, 1891, the company

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redeemed one of these bonds. On April 30th the company redeemed one; on September 30th the company redeemed one; and on February 29, 1892, the company redeemed one; and that the other two bonds, numbered, respectively, 75 and 84, remained in force and the dues were paid thereon up to and including the dues for the month of November, 1892, which were paid on the last day of October, of that year; and that on the 1st day of December, 1892, it being claimed by appellant that the December dues, which were to be paid on or before the 30th day of November, had not been paid, the bonds were declared forfeited by the officers of the company. It is claimed by Mr. Geer that on November 30, 1892, he paid to Mr. Tidball \$4, by check; he failed to produce the check, but did produce a receipt for the \$4, which is as follows:

“CHICAGO, November 30, 1892.

David S. Geer, Esq.,

DEAR SIR: Your remittance of \$4.00 just received, and will pay for same to the Tontine Bond Investment Association in payment of assessments for December, on bonds 75 and 84, C series.

Yours truly,

Z. L. TIDBALL.”

Mr. Geer says he did not know where the offices of the company were until after the forfeiture was declared; that he never made any inquiries as to who the officers of the Tontine Bond and Investment Association were until after they were forfeited; that he never went to the offices of the company to pay any of the dues; that it was all done through Captain Tidball, whom he knew; that he had taken one or two receipts from him, but not as a rule; that he gave him the money to pay; that he delivered the application to Captain Tidball; that he saw it before becoming a member. On December 2, 1892, it appears that after these bonds had been declared forfeited, Mr. Geer went to the office and tendered the amount due for dues upon these bonds, and was told there by the officers of the company in charge that the bonds had been forfeited, and that they could not accept his money.

BULKLEY, GRAY & MORE, attorneys for appellant, contended that officers of a corporation are special, not general, agents, consequently they have no power to bind the corporation except within the limits prescribed by the charter and by-laws. The principle that persons dealing with the officers of a corporation are charged with notice and authority conferred upon him, and of the limitations and restrictions upon it, contained in the charter and by-laws, is too well established to require to be supported by a citation of authorities. We can not assent to the proposition that there is any grant of power in the name by which the officer is designated. Beach on Corp., Sec. 384; Morawetz on Corp., Sec. 591.

Persons dealing with an agent of a corporation take the risk as to the extent of his authority. Theile v. Chicago Brick Co., 60 Ill. App. 559.

The president of a corporation has no implied authority to act as its agent. Wait v. Nashua Armory Ass'n, 14 Lawyers' Rep. An. 356, and note.

The president of a bank has no authority by virtue of office to surrender or release the claim of the corporation against any one, nor has the president of an insurance company any power to stay the collection of an execution in favor of the corporation. 17 Am. & Eng. Enc. of Law, 129, Par. E.

He who deals with a corporation is chargeable with notice of the purpose for which it was formed, and when he deals with its agents or officers he is bound to know their powers and the extent of their authority. This rule applies to foreign corporations as well as domestic corporations, and to corporations chartered by private acts of the legislature as well as to those whose charters are part of the general laws. 17 Am. & Eng. Enc. of Law, 142.

He who assumes to deal with a corporation through one of its members, must satisfy himself at his peril that the member has authority to act as agent of the corporation and that he is acting within the scope of his authority. Rice v. Peninsular Club, 17 N. W. Rep. 708; Beach on Corp., Sec. 187.

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The vice-president of a corporation may act on the death of the president, although the law does not expressly provide for any vice-president, but mentions simply president and other officers. *Coleman v. W. Va. O. O. & L. Co.*, 25 W. Va. 48. He may act as the president in signing a deed if there be no president. *Smith v. Smith*, 62 Ill. 493. He has no implied power to appoint agents to protect its lands or sell its lands. *Chicago & N. W. R. R. Co. v. Janes*, 22 Wis. 194; *Wait v. Nashua Armory Ass'n*, 14 Lawyers' Rep. An. 356, and note.

The authority to do an act does not imply the right to perform all acts, even of a similar nature. *Smith v. State Ins. Co.*, 12 N. W. Rep. 542.

Persons dealing with a corporation are bound to take notice of the provisions of its charter, constitution and by-laws. *Bocock v. Allegheny Coal & Iron Co.*, 82 Va. 913; *D. E. Bort v. Albert Palmer Co.*, 35 Hun 386.

J. L. BENNETT, attorney for appellee.

The vice-president of a corporation is an agent within the purview of section 5, chapter 110, of the Revised Statutes of 1874. He is a regularly elected and acknowledged officer of the corporation. He acts as president in the absence of the latter from duty, exercising such authority as the president might himself were he present, and although it might be difficult to define, with any decree of certainty, what are his ordinary duties, yet he is an agent of the corporation. *Cook v. Imperial Building Co.*, 152 Ill. 640; see also, *Lycoming Fire Ins. Co. v. Ward*, 90 Ill. 549; *Hall v. Harper*, 17 Ill., last par., p. 83; *McDermid et al. v. Cotton*, 2 Brad. 302; *Connett v. City of Chicago*, 114 Ill. 239.

Slight acts on the part of an officer of a corporation are sufficient to imply a ratification. 8 Am. & Eng. Ency. of L. 450.

A forfeiture clause in a policy will be construed most strongly against the insurer, and particularly against one who draws a contract containing a provision for a forfeit. *Ch. C. Ry. Co. v. Blanchard*, 35 Ill. App. 487.

Forfeitures are not favored by the law. *Vil. of Morgan Pk. v. Gahan*, 35 Ill. App. 652.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

These cases are so similar that but one opinion is written, it being applicable to each.

Appellant's brief contains the following:

"A vice-president is not an officer generally known to the law creating the corporation; he comes under the class usually known as 'such other officers and agents as shall be determined by the directors or managers.' He is, as this court has aptly said, a sort of a 'fifth wheel.' He is generally to act as president in case of the death, absence or inability of the president to act. He is a conditional officer. He is an officer at some future time after his election upon the happening of some contingency."

If all of appellant's contentions in this regard were conceded, still it would remain that the vice-president of a corporation may act as its agent, and if he be by it so recognized and treated or held out to the world, his acts, within the scope of the authority given to him, are as binding as those of any other agent. In other words, there is no reason why the vice-president of a corporation may not act as its agent, although not acting as president or vice-president.

In the present case, appellant permitted its vice-president, Z. L. Tidball, to solicit appellee to purchase its bonds. From January, 1891, to November, 1892, each month, it recognized payments by appellee to Tidball as properly made, and gave appellee proper credit and receipts therefor. Under these circumstances, appellant can not repudiate the payment made in the same manner by appellee, November 30, 1892, for which he took the receipt of Z. L. Tidball. Whether or not Mr. Tidball was then the vice-president of appellant is immaterial; he had been by it treated as its agent to receive dues, and still, apparently, was such.

Where a party so conducts himself as to lead others reasonably to believe that a person is his agent, such party

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will not be permitted to deny the existence of a relation he has thus induced others to believe existed. *Fame Ins. Co. v. Ward*, 4 Ill. App. 485—492; *Ewell's Evans on Agency*, 453; *Lycoming Fire Ins. Co. v. Ward*, 90 Ill. 545—549; *Cook v. Imperial Bldg. Co.*, 152 Ill. 638—640.

That Mr. Tidball did not have an office in connection with the company in October or November, 1892, is immaterial.

Appellee having been told that his bond was forfeited, and that no further payment would be received from him, was relieved from the necessity of making further tenders of payment, and is entitled to recover as if the further payments had been made, they, with interest thereon, being deducted from the amount of the matured bond. *Pulling v. Travelers Ins. Co.*, 55 Ill. App. 452; 159 Ill. 603. The judgment of the County Court is affirmed.

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1. **LIMITATIONS—*Defense of, Must Be Pleaded.***—The rule is uniform that the defense of the statute of limitations must be pleaded by one who relies thereon.

2. **SAME—*The Proper Practice.***—The proper practice in such cases is to declare upon the original obligation, and if the statute is interposed as a defense, to set up such facts by replication.

3. **COURTS—*Powers at Subsequent Terms.***—A court can not at a subsequent term, from its recollection, add to, or take from the record. There must be something to amend by.

4. **STATUTE OF LIMITATIONS—*What Act Applies.***—Upon a contract made prior to the revision of 1872, the proper plea of the statute of limitations is that in force prior to the revision, being that the cause of action did not accrue within sixteen years.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 27, 1896.

MASTERSON & HAFT, attorneys for appellant, contended that this action is controlled by the statute of limitations of 1849.

Section 24 of chapter 83 of the R. S. of 1872, is in part as follows: "But this section shall not be construed so as to affect any rights or liabilities or any causes of action that may have accrued before this act shall take effect."

The statute of limitations of 1872 is not applicable to contracts of prior date. *Tilton v. Yont*, 28 Ill. App. 580; *McMillen v. McCormick*, 117 Ill. 79; *Means v. Harrison*, 114 Ill. 248.

Consequently the law of 1849 applies.

Section 17, chapter 66, of the laws of 1849, is as follows: "All actions founded upon promissory notes, simple contract in writing, upon judgment, or other evidence of indebtedness in writing, made, caused, or entered into after the passage of this act, shall be commenced within sixteen years after the cause of action accrued, and not thereafter."

The note in question matured on the 22d day of November, 1867, and under the statute applicable thereto, it was absolutely necessary in order to maintain an action on the note, that such action be commenced on or before the 22d day of November, A. D. 1883, while, as a matter of fact, it was not commenced until the 7th day of December, A. D. 1894, or eleven years after a cause of action on the note had ceased to exist. *Keeler v. Crull*, 19 Ill. 189.

Justice Breese said: "My judgment leads me to this conclusion: that our statutes of limitations—R. S. 1845, Ch. 66; February 10, 1849, 132; of November 5, 1849, 37, and of February 17, 1851, 182—not only affirmatively declare within what time the actions specified shall be commenced, but inhibit bringing them after that time; and this intention is manifested by the words used, 'not after,' and 'not thereafter;' and that by, no judicial jugglery or craft, can, in any case, be taken out of their operation—neither by an express promise nor an implied one—that their provisions relate to the bringing the action, and not to the defense; that they are not required to be pleaded by a defendant, but the *onus* rests on the plaintiff to bring himself and his action within them."

In *Hill v. Henry*, 17 Ohio 1, and *White v. Beaumont*, 85 N. Carolina 3, it was held, that in order to maintain an

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action by reason of an indorsement of payment on a note, the indorsement must have been made before the note was barred. Then apply this rule, and admitting for the sake of argument only, that the payment of \$530 on the 29th day of August, 1867, took the note out of the statute, and that the payment of \$400 on the 15th day of February, 1869, again took it out of the statute of 1849, giving it a new lease of life for sixteen years, then the note was again barred on the 15th day of February, 1885, and consequently the payment of \$20, as sworn to by the plaintiff, on the 11th day of March, A. D. 1885, and the indorsement thereof on the note, after the note had been barred by the statute, under the authorities just above cited, would not remove the bar.

The statute of 1849, unlike the statute of 1872, now in force, provides no method of taking the case out of the statute, and we ask your honors to hold, as did the able and learned Justice Breese, that under the statute of 1849, the legislature meant precisely what it said, and that an action on a promissory note is barred within sixteen years, and barred absolutely, without any savings, exceptions, ifs or ands.

Where a statute of limitations begins to run it will continue to run until it operates as a complete bar, unless there is some saving or qualification in the statute itself. Board, etc., v. Gordon, 82 Ill. 435; People v. White, 11 Ill. 341.

The statute of 1849 provides that an action on a promissory note shall be brought within sixteen years, and not thereafter. That statute is mandatory and makes the commencement of an action within sixteen years after the maturity of the note a condition precedent to the maintaining of an action, and we submit can not be waived by the defendant herein, and that we are fully borne out in this contention by Burnside v. O'Hara, 35 Ill. App. 150, where the court says: "A waiver by an owner of that which the statute expressly makes a condition precedent to the attaching of a lien, can not be relied upon as a substitute for the performance of the condition in question."

In deciding this case a clear distinction must be made between a payment or promise, taking the case out of the operation of the statute, and a new promise or payment, which is a mere oral agreement to pay, made after the note has become barred, and having for its consideration a barred note, or merely a moral obligation to pay, and on that alone. We submit that there is no reasonable ground to contend, in the light of the authorities, that the payment of March 11, A. D. 1885, could in any manner, shape or form remove the bar that had already formed, when that alleged payment of March 11, A. D. 1885, is claimed to have been made. *Van Keuren v. Parmlee*, 2 N. Y. 523; *Carr v. Robinson*, 8 Bush. 269.

A promise to pay the principal but not the interest, will not support the recovery of interest. 2 Parsons' Bills and Notes, 656; *Pool v. Relfe*, 23 Ala. 701; *Duffy v. Phillips*, 31 Ala. 571; *Pearson v. Darington*, 32 Ala. 227; *Graham v. Keyes*, 29 Pa. St. 189.

Moses, PAM & KENNEDY, attorneys for appellee.

This being an appeal from an order overruling a motion to vacate the judgment, and not an appeal from the judgment itself, this court can only review the correctness of the decision of the court in overruling such motion, and not the correctness of the judgment itself. *Baits v. People*, 26 App. 43; *Wabash, etc., Ry. Co. v. People*, 106 Ill. 652; *Nat'l Ins. Co. v. Chamber of Commerce*, 69 Ill. 22; *Smith v. Brittenham*, 88 Ill. 291; *Radge v. Berner*, 30 App. 182; *Bressler v. Martin*, 42 App. 356; *Campbell v. Jacobson*, 44 App. 238.

The question raised by appellant that the action was barred by the sixteen-year statute of limitations, is not open to review in this court, because only the ten-year statute of limitations was pleaded; and the decisions in Illinois are uniform, that before the statute of limitations can be availed of in any action at law, the same must be pleaded by the person relying thereon. *Borders v. Murphy*, 78 Ill. 81; *Emory v. Keighan*, 88 Ill. 482; *Burnap v. Wight*, 14 Ill. 303; *Gebhart v. Adams*, 23 Ill. 397; *C. & A. R. R. v. Glenny*, 28 App. 361; *Cornwell v. Broom, Adm'x*, 34 App. 392.

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A party is not bound, in his declaration, to set out the facts which took the action on the note out of the bar of the statute. The proper practice in such cases is to declare upon the original obligation, and if the statute is interposed as a defense, to set up such facts by replication. 1 Chitty's Pleading, *583; Keener v. Crull, 19 Ill. 189; Varner v. Varner, 69 Ill. 445; Adams Express Co. v. King, 3 Brad. 316; Brockman v. Sieverling, 6 Brad. 512.

Appellant can not avail himself of the defense of the statute of limitations by motion in arrest of judgment, because the motion went to the entire declaration, which consisted of two counts, one on the note and the other the common counts. As to the latter the motion was clearly bad, and it being directed to the entire declaration, was too broad and was properly overruled. Shreffler v. Nadelhoffer, 133 Ill. 536; Gebbie v. Mooney, 22 Ill. App. 369; 121 Ill. 255.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of court overruling appellant's motion, made July 8, 1895, the June term, to set aside and vacate a judgment rendered that day. The order appealed from was made September 30, 1895—the September term.

The declaration contains a count upon a promissory note, described as made May 22, 1867, payable six months after date; and also includes several of the common counts.

The defendant pleaded the general issue and that the cause of action did not accrue within ten years.

The plaintiff replied, alleging a payment of \$20 March 11, 1895, and a written promise at that time by the defendant to pay the sum still remaining due.

The defendant rejoined that the action did not accrue within ten years, etc., and denied the payment of the \$20 set forth in plaintiff's replication, and denied the promise to pay.

Issue was joined, and the trial had. A verdict and judgment was rendered for the plaintiff.

Appellant contends that there was no necessity for plead-

ing the statute of limitations; that the declaration upon the note, showing that it became due in 1867, and that suit was brought thereon in 1894, disclosed no cause of action.

The rule is uniform that the defense of the statute of limitations must be pleaded by one who relies thereon. *Borders v. Murphy*, 78 Ill. 81; *Emory v. Keighan*, 88 Ill. 482; *Burnap v. Wight*, 14 Ill. 303; *Gebhart v. Adams*, 23 Ill. 397; *C. & A. R. R. v. Glenney*, 28 App. 364; *Cornwell v. Broom, Adm'x*, 34 App. 392.

Appellee was not bound, in his declaration, to set out the facts which took the action on the note out of the bar of the statute. The proper practice in such cases is to declare upon the original obligation, and if the statute is interposed as a defense, to set up such facts by replication. 1 Chitty's Pleading, 583; *Keener v. Crull*, 19 Ill. 189; *Varner v. Varner*, 69 Ill. 445; *Adams Express Co. v. King*, 3 Brad. 316; *Brockman v. Sieverling*, 6 Brad. 512.

Judgment in this case having been rendered at the June term, 1895, and no time having then been given within which to present a bill of exceptions, the court could not, at the October term, 1895, from its recollection, add to or take from the record made three terms previous. There is nothing showing that the court had before it any written memoranda from which it, at the October term, could by signing a bill of exceptions, add to the record of this cause. There is therefore in the record nothing to show upon what evidence the judgment was rendered. The common counts are sufficient to sustain the judgment.

The proper plea of the statute of limitations would have been that in force prior to the revision of 1872, being that the cause of action did not accrue within sixteen years.

The refusal of the Circuit Court to set aside the judgment is affirmed.

George M. Munger, Pliny P. Munger and Orett L. Munger v. Jadwiga Supancicz, by her Next Friend, John Krook.

1. APPELLATE COURT PRACTICE—*Errors Not Assigned*.—Where it is not assigned for error that the court below erred in denying, or not granting, the motion for a new trial, all causes for a new trial which are not of themselves the subject of exceptions, are beyond the consideration of the Appellate Court.

2. NEW TRIALS—*Conduct of Counsel*.—Conduct of counsel during the trial, if objectionable, however exceptional it may be, can not be made the subject of an exception *per se*. The only mode by which it can be brought before this court for review, is by exception to some ruling of the court in relation to it.

3. MOTION FOR NEW TRIALS—*Reasons Not Assigned, Waived*.—The logical consequences of holding that when a motion is made for a new trial, all reasons therefor not assigned in the motion are waived, seems to be, that if denying the motion is not assigned for error, everything prior to the motion stands unassailable.

4. REHEARINGS—*For What Purpose*.—Rehearings can not be allowed for the purpose of permitting a new case to be made for this court.

TRESPASS ON THE CASE, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed June 1, 1896.

WILLIAM B. KEEF, attorney for appellants.

BRANDT & HOFFMANN, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

It is not assigned as error that the Superior Court erred in denying, or not granting, the motion made by the appellant for a new trial, and therefore all causes for a new trial, which are not of themselves the subject of exceptions, are beyond our consideration. *Page v. People*, 99 Ill. 418; *Lang v. Max*, 50 Ill. App. 465.

Among such causes are, insufficiency of the evidence to

sustain the verdict, excessive damages and the conduct of counsel—if objectionable—during the trial. However exceptionable may be that conduct, it can not be made the subject of an exception *per se*; the only mode by which it can be brought before us for review, is by exception to some ruling of the court in relation to it. It is not necessary for us to say what we think of matters not properly presented to us. The logical consequence of holding that when a motion is made for a new trial, all reasons therefor not assigned in the motion are waived (Geist v. Pollock, 58 Ill. App. 429), would seem to be that, if denying the motion is not assigned as error, everything prior to the motion stands unassailable.

But not going now so far as that, any supposed extravagance of counsel in addressing the jury being, of itself, not the subject of exception, is not on this record before us for review. Case last cited, and E. J. & E. R. R. v. Fletcher, 128 Ill. 619; Holloway v. Johnson, 129 Ill. 367; 2 Ency. Pl. & Pr. 752 *et seq.*

The speech of the attorney of the appellee, reported in the bill of exceptions, is pretty well sprinkled with exceptions by the appellant, but it does not appear that the judge heard either speech or exceptions. The indications are that the exceptions were allowed by the reporter. The court is not shown to have made any rulings.

Nothing is left for the appellant to complain of but the refusal of some instructions. But of those which the brief says were refused, the record shows some were given, and all the material parts of those which were in fact refused were in others that were given.

There is nothing to review, and the judgment is affirmed.

OPINION BY MR. JUSTICE SHEPARD UPON PETITION FOR A RE-HEARING.

A rehearing is applied for to permit an assignment of error to be made which would admit of a consideration of the cause upon its merits.

In denying a rehearing, we may say that we did consider

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and decide that the cause should be affirmed on its merits, before discovering that no error had been assigned under which we had the right to so decide it. *Ditch v. Sennott*, 116 Ill. 288.

Rehearings can not be allowed for the purpose of permitting a new case to be made for this court. *Thompson v. Economy Furniture Co.*, 64 Ill. App. 140; *Schumacher v. Bell*, 61 Ill. App. 644; *Ætna Iron Works v. Owen*, 62 Ill. App. 603.

Rehearing denied.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—NOVEMBER TERM, 1895.

John H. DeWolf et al. v. Cora Boswell et al.

1. **LOST RECORDS—Restored Pending an Appeal.**—Where the records of the Circuit Court have been lost by fire, it is proper to restore them by proceedings in such court pending an appeal, and to file such restoration as an amended record in the Appellate Court.

Trespass on the Case, under the dram shop act. Appeal from the Circuit Court of Fulton County; the Hon. JEFFERSON ORR, Judge, presiding. Heard in this court at the November term, 1895. Affirmed. Opinion filed May 16, 1896.

WALKER & LANDAUER, GRANT & CHIPPERFIELD, DANIEL ABBOTT and JOHN A. GRAY, attorneys for appellants.

K. THOMAS and H. W. MASTERS, attorneys for appellees.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$2,500 upon a cause of action arising under the dram shop law, as alleged.

The only objection urged by the appellants in their brief was that the record failed to show any judgment whatever as to two persons who were joined with them as defendants. At the May term, 1895, the appellees represented to this court that there had been an order of discontinuance as to

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the persons named, duly entered before the final trial, and that the record containing said order had been destroyed by fire, and the cause was continued in this court to permit them to apply to the Circuit Court for a restoration of the record. A certified copy of the proceedings of the Circuit Court has now been presented (with a motion for leave to file) showing a restoration of the record and a copy of the order so restored, from which it appears that the cause was dismissed as to said persons before the last trial. The appellants objected to the filing this additional record upon the ground that they had appealed from the order allowing said amendment, which appeal was perfected and the questions arising thereon were ready to be presented to this court at the present term. We therefore reserved that motion to the hearing, and in effect consolidated the two cases—treating the appeal in that case as a part of this.

Having considered the points presented by that appeal, we find no error in the proceedings, and must therefore permit the additional record to be filed. The record being thus amended, the objection urged by appellants to this judgment is obviated, and no other objections appearing the judgment must be affirmed.

John W. Jordan v. Ocean Wilson et al.

1. **STATING ACCOUNTS—*Between Partners.***—Where the individual property of a partner has been used by the firm in the transaction of its business, an equitable allowance against the firm and in favor of such partner should be made to compensate him for the use of his property.

2. **SAME—*Special Rules and Directions.***—The court in this case reverses the decree and remands the cause with instructions to the court below to permit the parties to introduce testimony as to the reasonable use of individual property, etc.

Bill to Settle Copartnership.—Error to the Circuit Court of DeWitt County; the Hon. LYMAN LACEY, Judge, presiding. Heard in this court at the November term, 1895. Reversed and remanded with directions. Opinion filed May 16, 1896.

STATEMENT OF THE CASE.

On the 11th day of June, 1892, the plaintiff in error, John W. Jordan, and Ocean Wilson, formed a partnership under the name and style of O. Wilson & Co., for the purpose of engaging in the business of buying and selling grain and coal.

Wilson had previously been engaged in the same line of trade and owned an elevator which stood upon leased ground.

It was agreed Jordan should pay Wilson \$2,000 for one-half interest in this elevator, and that thereupon it should become firm property. The partners were to be interested equally in the profits or losses of the business.

The firm ceased to transact business March 12, 1894.

Jordan filed a bill in chancery against Wilson to obtain settlement of the copartnership, and, claiming that he has paid for one-half the elevator, and that it was firm property, made parties to the bill certain persons to whom Wilson, about the time the firm abandoned business, executed chattel mortgages or a bill of sale for the elevator to secure his individual indebtedness, and as to such defendants, prayed their mortgages or bill of sale might be decreed of no effect against the right and interest of the firm and its creditors.

The defendants answered; the property of the firm (and that claimed to be such) was committed to the custody of a receiver, and the cause was referred to a master to take and report the proof, together with his findings and conclusion.

The master filed report, together with a statement of the accounts and affairs of the firm, and of the partners.

After hearing exceptions thereto the court rendered a decree directing the master to restate the account in accordance with the rulings of the court upon the exceptions, and upon the coming in of such restated account entered a decree in effect that the plaintiff in error, Jordan, had not made the necessary payments to entitle him to an interest in the elevator property, and had no interest therein, and that the defendant in error, Wilson, was indebted to Jordan upon an adjustment of accounts between them as partners.

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in the sum of \$63.50, and that the assets of the firm were as follows:

Book account and notes, typewriter, desk, table and chairs, office, well, pump, tank, oats clipper, two jets; and ordering the receiver to sell such assets and apply the proceeds upon indebtedness of the firm set forth in the decree.

This is a writ of error brought by Jordan to obtain a reversal of the decree.

E. J. SWEENEY and WILLIAM MONSON, attorneys for plaintiff in error.

FRED. BALL and R. A. LEMON, attorneys for defendants in error.

MR. JUSTICE BOOGES DELIVERED THE OPINION OF THE COURT.

The principal question presented is, whether the court erred in finding the elevator property was not the property of the firm. Plaintiff in error claimed he paid Wilson \$1,000 at one time upon the price of the elevator, and delivered to the firm a large amount of grain belonging to him individually, of value sufficient, together with the alleged cash payment, to complete the purchase of the elevator. The defendant in error claimed the \$1,000 alluded to was borrowed by Jordan and paid into the firm to supply a sudden pressing need of funds, and was withdrawn by Jordan soon after and returned by him to the person from whom it had been borrowed, and as to the individual grain delivered the firm by Jordan, the claim of Wilson was, Jordan withdrew from the funds of the firm for private purpose an equal, or even greater amount.

A conclusion upon the question involved consideration of conflicting testimony of witnesses and the examination of the books of account of the firm covering the period of its existence and embracing many items, amounting in the aggregate to near \$200,000. It is not practicable we should here state in detail such testimony or set forth the numerous items of account. It seems to us sufficient to say as to this point an examination and consideration of all the proof

bearing upon it has developed no sufficient reason for declaring the chancellor erred in his conclusion with relation to it.

The firm used the elevator property in the transaction of the business of buying and selling grain during the entire time of its existence. It was therefore equitable an allowance against the firm in favor of Wilson should be made to compensate him for the use of his property.

The court to accomplish such a result decreed Jordan should account to Wilson for one-half the rental value thereof, and fixed such at the sum of \$2,712.60, being, it will be observed, at the rate of nearly \$1,550 per year, and in adjusting the accounts of the partners charged Jordan with \$1,356.80 as for one-half the entire rental charge.

That property of the value of \$4,000 should have a rental value of about \$1,500 per annum, strikes the mind at once as highly improbable and unreasonable.

The only proof in the record to support it is found in the testimony of Wilson to the effect the rent of an elevator equipped as was the one in question ought to be worth one-half cent per bushel for the grain handled through it. Upon that basis the rental was fixed. Herein we think the plaintiff in error has just ground of complaint.

The firm during the entire time of its existence used the elevator as firm property, and out of partnership funds paid the rent of the ground upon which the elevator stood, built an office upon the elevator grounds and constructed there a driveway, dug an expensive well, provided a costly pump and a tank, made repairs and additions to the property, all at the expense of the firm.

Such expenditures were made with the mutual approbation of the partners upon the theory the elevator property was, or would be, firm property and for the purpose of properly equipping it. Presumably it was necessary to the proper working of the elevator such articles and appliances, etc., should be provided, and in the estimate of the rental value of the elevator upon which the court acted, the equipments were considered as elements of rental value. But the court ruled the office, well, pump and tank were the

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property of the firm—the tenant—and did not belong to Wilson, the landlord, and directed they should be sold by the receiver as assets of the firm. If in this the court ruled correctly, it is clear the basis of the assessment of rental value was not the correct one nor was it just to the plaintiff in error.

It appeared the firm had paid taxes and insurance upon the elevator and also the cost of constructing a driveway upon the premises. The court ordered Wilson should pay Jordan for one-half thereof, the reason given for such ruling as to the driveway being that it was unsalable, etc. The well cost \$214, and we are unable to understand why it should have been deemed salable.

It constituted a part of the elevator property as did also the office, pump and tank.

Wilson so regarded it and assumed to be the sole owner of the entire property and in accordance with that assumption transferred it to Mason & Wagoner by an instrument in writing in which the "office" is included in express terms, and the well, pump and tank by fair implication. We note, also, another error prejudicial to the plaintiff in error.

Wilson kept the books of the firm and managed its financial affairs.

He kept no account of the moneys applied by him to his individual purposes.

The master, for this reason, very properly adopted the plan of so framing his statement of the account as to charge Wilson with all moneys received for the firm and to credit him with all disbursements for firm purposes, and required him to account accordingly.

The firm borrowed \$500 of one Thorp and executed the note of the firm therefor.

This money was paid to Wilson and should have been, but was not, debited to him by the master.

The fact the firm had not paid the note, and that judgment had been entered upon it in favor of Thorp, had no effect to change the manner of stating the account as between the partners.

All disbursements on behalf of the firm were credited to Wilson. If he used the money received from Thorp in paying firm obligations, he received credit therefor, and clearly should have been debited with the money supplied the firm by the loan from Thorp with which he discharged the obligations wherewith he was given credit.

If he did not use this money in discharging firm obligations but applied it to his individual purposes, that he should have been charged with it is beyond doubt or cavil.

As to this item of money borrowed from Thorp, and as to the allowance in favor of Wilson for rent of the elevator, and as to the disposition ordered to be made of the office, the well, the pump and the tank, the decree is reversed and the cause remanded, with instructions to the court to permit the parties to introduce testimony as to the reasonable rental value of the elevator property, which shall be deemed to include also the well, the office, the pump and the tank, and to ascertain such rental and charge one-half thereof to the plaintiff in error in favor of Wilson, and credit Jordan as against Wilson with one-half of following sums: \$100 expended in constructing the office; \$214 expended about the well; \$72.23 expended for the pump, and \$15 for the tank; and revise the list of assets of the firm by striking therefrom the office, well, pump and tank—and decreeing they constitute part of the elevator property. The court will also credit Jordan as against Wilson with \$250, one-half the sum borrowed from Thorp, and restate the account, and render decree accordingly.

It is not to be understood we hold the amount of grain handled through the elevator is not proper for consideration in arriving at a conclusion as to its fair rental value. The capacity of the elevator and the extent to which it was used by the firm are elements of rental value, and may be so considered in connection with all other facts and circumstances which bear upon the question of the reasonable and fair value of the use of such property.

To the extent indicated the decree is reversed and the cause remanded. Reversed and remanded with directions.

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Charles E. Hay v. The City of Springfield and The Capital Electric Company.

1. **MUNICIPAL INDEBTEDNESS—*Excess of Constitutional Limit.***—The acceptance of a proposition by a city, while indebted, in excess of the constitutional limit, by which it will be able to acquire an electric light plant for the purpose of lighting its streets, and pay for the same out of its annual levy for lighting purposes, without in any way increasing its indebtedness, is legal and not in excess of its powers.

2. **SAME—*When a Tax Payer can not Complain.***—The power of a city to light its streets includes the power to acquire by purchase or building, a plant for such purpose, and if this can be done by an accumulation from taxes within the power of the city to levy, without imposing unduly upon the tax payer, he can not be heard to object in a court of equity.

Bill for an Injunction.—Appeal from the Circuit Court of Sangamon County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the November term, 1895. Affirmed. Opinion filed May 16, 1896.

H. S. GREENE, PALMER, SHUTT, DRENNAN & LESTER, CONKLING & GROUT, and LOUIS J. PALMER, attorneys for appellant.

E. S. ROBINSON, city attorney, J. C. SNIGG, and E. L. CHAPIN, corporation counsel, for the city of Springfield.

LLOYD F. HAMILTON and SAMUEL P. WHEELER, attorneys for the Capital Electric Co.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellant filed his bill in chancery against the appellees alleging that he was a resident and tax payer of said city; that on the 30th October, 1894, the city council adopted the following ordinance:

“Whereas, the Capital Electric Company of the city of Springfield, Illinois, has submitted to the city of Springfield, Illinois, the following proposition in words and figures following:

“To the City Council of the City of Springfield :

The Capital Electric Company of the city of Springfield proposes as follows :

Article 1. To furnish for the use of said city to light its streets, alleys, avenues, sidewalks, public grounds and public buildings three hundred (300) arc lights, and such additional number of arc lights as the city council may from time to time order, all of two thousand (2,000) nominal candle power, and to light the same on moonlight schedule, and on very cloudy nights, at and for the price of \$113.33 (one hundred and thirteen and thirty-three one-hundredths dollars) for each arc light per annum.

Article 2. This company proposes to erect a plant capable of lighting said city with three hundred (300) arc lights of nominal two thousand (2,000) candle power, and to add two (2) fifteen hundred (1,500) sixteen (16) candle power incandescent alternating dynamos, all to be of recent manufacture and to be of first-class workmanship, and to superintend the erection and operation of said plant and to procure the necessary funds for the erection of the same.

Article 3. If the city council of the city of Springfield shall each year draw and deliver to its order, in favor of the company, on the city treasurer of the city, as soon as the annual levy and appropriation for lighting the streets of said city shall be made, and payable only out of the said street lighting fund, when collected, for a sufficient sum to pay said Capital Electric Company at the rate of one hundred and thirteen and thirty-three one-hundredths dollars for each arc light per annum ordered by the city council and furnished by said company, payable at the expiration of each and every month that the lights have been furnished, and said company agrees to apply such funds to paying the current expenses incurred in operating said plant in lighting said streets and alleys of said city, and the interest on purchase money required to erect said plant, any portion or balance remaining out of said lighting fund after paying the current expenses and interest as aforesaid shall be credited to the account of said city and shall be applied to paying the purchase price of said plant if the city elects

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to purchase the same. But it is understood and agreed by said company that in case the city accepts this proposition, such acceptance shall create no indebtedness against said city in favor of this company. This company expressly agrees in case the city shall elect to draw and deliver the said order or orders for the purpose aforesaid that this company will not look to the city of Springfield for the payment of said order or orders, but will look for payment only to the lighting fund, which shall have been levied and appropriated as aforesaid. And in case the city shall accept this proposition, it is expressly agreed by this company that it shall be optional with the city whether it shall draw and deliver the said order or orders to said company or not.

Article 4. The Capital Electric Company proposes to erect a suitable electric plant, and to keep full and complete account of the cost thereof, and to maintain and operate the same on an economical basis, and to keep an accurate and fair account of the cost of such operation and maintenance, and whenever the profits arising from the operation of said plant shall have paid the cost of said plant and interest thereon, and the cost of operating and maintaining the same, the city of Springfield may, at its option and election, take the said plant; and in case the city does so elect, the Capital Electric Company will convey the said property and plant to the city of Springfield, free of incumbrance, but no obligation or liability rests on the city of Springfield to pay any sum of money except for the lighting of the city, and when the city exercises said election, this company shall be thereby released from any obligation to furnish lights as provided for herein.

Article 5. It is hereby agreed and understood by and between the city of Springfield and the Capital Electric Company, that the said company shall furnish to the said city incandescent lights for the lighting of the City Hall and engine houses without cost to said city, so long as this proposition shall be in operation; the city to furnish all renewals and police station.

Article 6. The city council by and through the proper

committee, or any duly authorized agent, shall have access at any and all times to the books and records of said company.

Article 7. The officers and directors will not receive any salaries or fees in the conduct and management of said plant.

Now, therefore, be it ordained by the city council of the city of Springfield, that the foregoing proposition of the said Capital Electric Company be and is hereby accepted."

That the city was then and for a long time had been indebted in excess of the constitutional limit of five per cent upon the assessed valuation of taxable property therein; that the proposition set out in said ordinance and the acceptance thereof were merely the formation of a plan theretofore devised whereby the city might evade the constitution, and acquire an electric light plant, and that the acceptance of the proposition in legal effect created an indebtedness on the part of the city to said Capital Electric Company in violation of law, and was therefore void. That in pursuance of said ordinance the said company had built the plant, and that the lights had been furnished, and that a bill for the month of June, 1895, had been paid according to said contract amounting to \$2,883.33.

That before the plant was complete said company had leased the same to the firm of McCaskey & Holcomb, and that the latter had thereby agreed to furnish the 300 arc lights to the city at \$60 per annum for each light whereby the said company was deriving a net profit of about \$1,300 per month on the said contract. That the price fixed in said contract was exorbitant and known to be so by the council when it was accepted, and more than would have been necessary, had fair competition been invited or permitted. That said plant is being operated in pursuance of the terms of said agreement with the understanding that the excess shall in some way be enjoyed by the city, but that such agreement was unlawful, oppressive on the public, and *ultra vires*, the ulterior design being that the city should acquire the plant and that a fund specified in the appropria-

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tion ordinance, known as the "street lighting fund," amounting to \$34,000 per annum, was being thus diverted to that purpose, and that if not prevented such unlawful action would be continued.

Prayer that the contract be set aside, that the city be required to invite competition for lighting, and to accept suitable propositions to be so obtained, for a temporary injunction and for general relief.

The answer of the city averred that for eight years prior to October 30, 1894, the streets had been lighted by arc and incandescent electric lights and by gas, the power of all the light so obtained being 306,356 candle power; that said electric light was furnished by the Springfield Electric Light and Power Company, and the gas by the Springfield Gas Company; that complainant was interested financially in said last named electric light company and that many of the shareholders in that company were also shareholders in said gas company; that there were then no other electric or gas companies in said city; that the city had been paying \$137 per year for each of the 147 arc lights furnished by said last named electric company, and proportionately for the incandescent and gas lights, amounting to the sum of \$2,346.02 per month, or \$20,161 per year; that the light so obtained was poor and utterly insufficient to meet the wants of a city of 35,000 people, and that there was a great popular demand for more and better light by the abandonment of the gas and incandescent lights and substitution therefor of arc lights; that negotiations with the said electric and gas companies for more, better and cheaper light having failed, and the said Capital Electric Light Company having submitted the proposition set out in said ordinance, the city council thought it better to obtain 300 arc lights of 600,000 candle power at \$2,833.33 per month than to pay \$2,346.77 per month for the lights then in use, aggregating only 306,356 candle power; that it was true the city was then indebted beyond the limit fixed by the constitution, and knew it could not become indebted further, and denied that by said scheme it was to, or did create, any additional indebtedness, but that it merely

availed itself of the opportunity offered by said proposition, whereby it could obtain ninety-eight per cent increase of light at an additional expense of thirteen per cent, with the option to cease at any time, and with the further option of acquiring the plant as provided, which latter option had not been accepted.

That it was free to continue the use of said 300 arc lights or not, and was under no obligation whatever in that respect.

That the free incandescent lights furnished under said arrangement, to the city buildings, amount in value to \$194.40 per month, which would be an annual saving of \$2,332.80.

Denied all unlawful confederation, etc., etc.

The Capital Electric Company filed its answer in which it stated, at some length, the condition of the city in respect to lighting, the negotiations between the city and the old electric light and gas company, the organization of the defendant company for the purpose of relieving the city and the submission of the proposition referred to, its acceptance as shown by the ordinance, and the construction of the plant; denied that the city was under any obligation to take the light or to take the property, but that it merely had an option to do so, and denied that by reason of what has been done, the city had incurred any indebtedness whatever.

This summary of the pleadings, which omits many details, will sufficiently disclose the real nature of the controversy. The cause was heard on bill, answer, replication and proofs, and the court rendered a decree dismissing the bill at the cost of complainant, from which the present appeal is prosecuted. It appeared from the evidence that for some years prior to October 30, 1894, the city had been lighted, as stated in the answer, by 147 arc lights, by incandescent lights and by gas; the entire quantity of light being, as measured by candle power, but slightly more than one-half the amount now produced by the 300 arc lights furnished by the defendant Capital Electric Company, and

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to this should also be added the free incandescent lights supplied by the latter company to the city buildings. According to the testimony of Mr. Southwick, who was a member of the council and a member of the special committee of three to investigate the matter of electric lighting, it had cost the city for several years an average of \$34,000 per year for the light it had so used.

This is higher than the amount stated in the answer, but it seems to be corroborated by other evidence in the record, and, so far as we have been able to find, is not contradicted. This witness states that as the city had been in the habit of placing that amount in the annual appropriation bill for lighting purposes the suggestion was that that sum should remain the basis of the city's expenditure for light, but the desire was to get more and better light and if possible also to acquire a plant. It appears that this was the subject of much public agitation and that it became an issue in municipal elections—and that the council endeavored to obtain concessions from the companies then furnishing the lights but without satisfactory results.

It appears that those companies were principally controlled by the same parties and that the appellant was identified with that electric company. As the city was indebted beyond the limit, the question was how to reach the desired end. The Capital Electric Co. was organized with some sixty stockholders, all citizens, no one taking more than \$1,000 of stock, with the avowed purpose of relieving the city in the premises and disclaiming any purpose of profit to the stockholders.

Nothing was paid on the stock, though it was all subscribed and no certificates of stock were issued. The money to build the plant was borrowed from different banks in the city upon the company's note, secured by a pledge of its stock list—each subscriber being considered solvent for the amount of his subscription, and so the plant was constructed. There is no incumbrance upon it. Before the adoption of the ordinance the company had effected an agreement with McCaskey & Holcomb, by which the latter were to take the

property and operate it and furnish the arc lights for the city at \$60 each, per annum, some \$53 less than the price fixed in the ordinance—and by which they were to receive seventy-five per cent of the income from commercial lighting.

This contract, which was very favorable to the company, was obtained, as it seems, in part consideration of the agreement of the company to buy its machinery from the manufacturing company represented by McCaskey. This was known to the council before the ordinance was adopted; doubtless it influenced their action more or less.

Afterward the old company made a proposition to furnish 300 arc lights at \$90 each per year, but this was thought to be less favorable to the city than the proposition already accepted, and so it was declined. On this occasion the contract of the Capital Company with McCaskey & Holcomb was fully stated to the council by Mr. Tracy, the president of the company, and it was argued that if the city should avail itself of the option presented by the proposition of this company it would in four or five years have the right to own the plant without further cost, and it is to be presumed that the view thus presented had something to do in inducing the conclusion to reject the proposition of the old company.

It is apparent that if the proposition of the Capital Company could be accepted, or if the option it proposed could be made available, it was much more desirable than that of the old company, and that there was no mistake made in adhering to it.

Aside from the reasons that operated upon the council the question is whether their action did in form impose a pecuniary obligation upon the city, it then being incapable of increasing its indebtedness.

This in substance is the point as presented in the brief of the appellant; and as is there well remarked, if no contract was entered into by the city there was no occasion for filing the bill, as there was nothing to enjoin; but, as is argued, if the parties intended to make a contract, and as far as they

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could, did, then the bill was properly filed. Regardless of what may be supposed was the intent as gathered from extrinsic circumstances, it is to be ascertained what is the true construction of the ordinance.

Does it impose any obligation upon the city of which the law would take notice if the city were untrammelled by the limitation of the constitution?

The proposition contains seven articles, the first of which, in a single sentence, is an offer of three hundred arc lights and such additional number as may be required, at \$113.33 each, per year; the second contains a statement of the capacity and style of the proposed plant and that it should be erected and operated under the supervision and with the funds of the company; the third provides that if the city council shall annually deliver to the company an order on the city treasurer for a sum sufficient to pay for the lights at the price named in article one, payable at the expiration of each month during which the lights have been furnished, then the company is to credit the city with the surplus above cost of production, which sum so credited shall be applied to the purchase price of the plant, if the city shall elect to purchase the same, and further:

“But it is understood and agreed by said company, that in case the city accepts this proposition, such acceptance shall create no indebtedness against said city in favor of this company. This company expressly agrees in case the city shall elect to draw and deliver the said order or orders for the purpose aforesaid, that this company will not look to the city of Springfield for the payment of said order or orders, but will look for payment only to the lighting fund which shall have been levied and appropriated as aforesaid. And in case the city shall accept this proposition, it is expressly agreed by this company that it shall be optional with the city whether it shall draw and deliver the said order or orders to said company or not.”

By the fourth article the company proposes to keep an account of the cost and operation of the plant, and that when the profits shall have paid the cost of the same, the

city may take it free of incumbrance, but no obligation rests on the city to pay any sum except for lighting.

The fifth refers to incandescent lights to be furnished free to the city buildings.

The sixth gives the city access to the books of the company and the seventh provides that the officers and directors shall receive no compensation for their services.

It is argued that the first article, unless modified by the third, creates a contract in and of itself when accepted by the city, and then it is attempted to show that the provisions of article three have no reference whatever to article one, but that the latter is wholly independent of all else in the offer.

Counsel dwell upon the phraseology of the third article, "in case the city accepts this proposition such acceptance shall create no indebtedness," and the company agrees "in case the city shall elect to draw and deliver such order" that it will look, not to the city, but only to the lighting fund, for the payment of the order, and insist that by "this proposition" is meant only what is contained in article three. It seems clear that this view is negatived by the next and last sentence of the article, which reads as follows:

"And in case the city shall accept this proposition it is expressly agreed by this company that it shall be optional with the city whether it shall draw such orders or not."

"This proposition," as it occurs in this sentence, plainly refers to the offer as a whole, and there is no fair construction which would give the same words occurring in the preceding sentence a different meaning. Turning to the ordinance, it is seen that it begins thus:

"Whereas, The Capital Electric Company has submitted to the city of Springfield, Illinois, the following proposition, in words and figures following.

"To the City Council of the City of Springfield:

The Capital Electric Company of the city of Springfield proposes as follows: Article I," etc., and closes thus:

"Now, therefore, be it ordained by the city of Springfield that the foregoing proposition of the said Capital Electric Company be and is hereby accepted." ..

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Manifestly it was understood that the offer was entirely all one proposition. In the bill it was so treated. For example (see Abstr. p. 2), it is averred that said company submitted a proposition to the city, a copy of which is attached, and that "in the second article of this proposition," etc., "and by article one," etc. In various averments of the bill "the proposition" as a whole is referred to, as for instance, (Abs. 3) it is said the scheme involved in "the proposition" was to evade the constitution, and that the provisions of "the proposition" are involved, obscure, and contradictory, and a charge (Abst. 7) which clearly couples the first and third articles, and that "article four of said proposition is vague," etc. So it would seem that the position now taken in the argument was not in the mind of counsel when drawing the bill and is somewhat of an afterthought. Still if it is sound it should be so declared; but we think it is unsound. It is perfectly plain that it was not intended to bind the city to take the light for any particular time or to take the plant. It was wholly at the option of the city to avail of the opportunity offered as to the light from month to month or as to the acquisition of the plant.

As to the light used, the only thing the city was expected to do was to exchange therefor its warrant out of the fund to be appropriated for lighting purposes and to incur no responsibility in respect to the ultimate payment of the warrant.

Manifestly it was the express purpose and intention that the city should be under no obligation but should merely have the option of taking the light. It might begin to take or not. Having begun it might continue or not, just as it should choose. True, there was an inducement which would probably lead to continued acceptance of the privilege offered, in that the profits of the business should be credited to the city and would in a few years make the city the owner of the plant. It seems hardly necessary to discuss this point further; indeed it is not apparent how it can be further discussed without merely repeating what has already been said.

Counsel for appellant also argue that the supposed contract is invalid because of the statutory provisions with regard to the annual appropriation bill and the annual tax levy.

If there was no contract the objection is not important. Besides, we find no such allegation in the bill, and would not be disposed to consider such an objection when it is presented here for the first time.

It is further argued that the contract was unreasonable. Here again the answer is that if there was no contract the objection can not be entertained. Aside, however, from the matter of contract, as to which we care to say nothing further, it may not be amiss to consider the position of the city if it shall continue to avail itself of all the option it has under the proposition.

It needs the light, and if it should pay the price named it will be better off than to return to the old condition of things, where it paid nearly if not quite as much and got in return a little more than half the light.

Should it ignore the present arrangement and submit the matter to competition it might do better and it might not.

That would depend upon various contingencies which will readily suggest themselves on reflection.

If the financial condition of the city is such that the annual appropriation of \$34,000 for lighting can be easily maintained, it would seem to be a wise and judicious use of the money to apply it according to this proposition; for if the contract of McCaskey & Holcomb is carried out it is probable that in the course of four or five years the city will have the right to take the plant without further outlay. As is conceded by the brief of appellant, the power to light the streets includes the power to build or purchase a plant. If this can be done by an accumulation from taxes within the power of the city to levy without imposing unduly upon the tax payer, why should any one object, unless it can be shown that as a matter of policy based on experience or observation, it is better that the city should buy the light rather than undertake to produce it?

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And would not this be a consideration that should be left to the council? Would a court of chancery go into such an inquiry or an inquiry that assumed or conceded the power of the city to act in the premises?

It is urged by appellee that the bill was not filed by the complainant in good faith as a tax payer, but that he is acting merely in the interest of his Electric Company, and that there was unwarranted delay in bringing the suit. As we regard the case it is unnecessary to discuss the points thus presented, nor have we followed in detail the argument of appellant, but have sought rather to condense the whole case, so as to present it, and our view of it, as briefly as possible. We are of opinion the decree dismissing the bill was properly entered, and it will therefore be affirmed.

H. J. Hubbart v. H. S. Nichols & Son.

1. **LACHES**—*In Suing Out a Certiorari*.—A person who sues out a writ of certiorari to review a justice's judgment, within the time limited by law, can not be said to be guilty of *laches*.

2. **LIMITATIONS**—*Defense of*—*In Equity*.—Equity entertains no presumption against the defense of the statute of limitations.

3. **REMEDIES**—*Under Section 80 of the Justice's Act—Not Exclusive*.—The remedy provided by section 80, chapter 79, R. S., entitled *Justices and Constables*, is not exclusive.

Assumpsit, for money had and received. Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the November term, 1895. Reversed and remanded. Opinion filed May 16, 1896.

W. A. PERKINS and W. H. BLACK, attorneys for appellant.

FRANCIS M. GREEN, attorney for appellees.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

On May 11, 1891, appellees recovered a justice's judgment against appellant for \$136 and costs, from which he prayed

and endeavored to perfect an appeal, but the justice refused to approve the bond he tendered. Execution having been returned unsatisfied, a transcript was filed in the circuit clerk's office, and under execution thereon the sheriff levied upon wheat of the defendant, and had it hauled to Sadorus to be stored until it should be advertised and sold. While the teams were on the way with it he consented that defendant, if he chose, might dispose of it by private sale, the purchaser paying the price to him, the sheriff, which was done. The sheriff received for it \$174.15, retained \$164.75, the amount of the judgment, costs and expense for hauling, paid the residue to the defendant and returned the execution satisfied September 10, 1891. On the 10th of October, the defendant therein, appellant here, filed his petition for a certiorari to the justice, in the case mentioned, which was awarded at the next term, March, 1892, and at the next, the case standing upon the docket for trial as upon appeal, the plaintiffs therein, appellees here, appeared by their attorney and dismissed it, and judgment was rendered against them for costs. Thereupon this action was brought by appellant, originally in trespass, against appellees, the justice of the peace and the sheriff, but was dismissed as to the justice and sheriff, and the form changed to assumpsit for money had and received. The parties resided, the transactions stated took place and the proceedings herein, down to the trial, were had in the county of Champaign; but for reasons personal to the presiding judge it was tried in Macon county, without a jury and upon the general issue only. The finding was for the defendants, and judgment accordingly; from which this appeal was taken.

It appears that appellant submitted to the court propositions of law to the effect that the satisfaction of the execution was not by voluntary payment and did not bar a recovery in this case of the amount received and retained by the sheriff; that by their appearance on the writ of certiorari the Circuit Court of Champaign County acquired jurisdiction of the subject-matter and of the persons of appellees, and that the judgment, or their dismissal of the suit, was

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proper and binding, and estopped them from setting up the cause of action alleged in that case as a bar to this action; that such dismissal and judgment thereon amounted to a reversal of the judgment of the justice, and entitled appellant here to recover the amount collected by the sheriff under the execution on that judgment. These were all refused. On what grounds we are not advised; but the points suggested in the argument are that the delay in suing out the certiorari was *laches*; that the judgment was voluntarily paid by appellant; that his defense to the note and account on which the justice's judgment was rendered—being the statute of limitations—was not equitable; and that his only remedy, if any, was under Sec. 80 of the justices' and constables' act, (R. S. Ch. 79). We think neither is tenable. The certiorari was sued out within the time expressly allowed by law; equity entertains no presumption against the defense of the statute of limitations, and the remedy provided by Sec. 80 of Ch. 79, R. S., is not exclusive. *McJilton v. Love*, 13 Ill. 494; *Richeson v. Ryan*, 14 Id. 7; *Field v. Anderson*, 103 Id. 403.

For error in refusing to hold these propositions the judgment will be reversed and the cause remanded.

Metropolitan Life Insurance Co. v. Joseph P. Bergen.

1. **NEGLIGENCE—*Of an Attorney—Chargeable to his Client.***—A defendant employed a firm of attorneys to defend a suit for him. The partner with whom the arrangement was made left town temporarily, and inadvertently neglected to notify his copartner of the employment of the firm. During his absence a judgment was taken by default. Upon an application to set aside the default it was held that the general rule that the negligence of the attorney is the negligence of the client was applicable, and the court below was warranted in enforcing it unless it clearly appears that the default and judgment will work gross injustice.

2. **PRACTICE—*Defaults—Defective Declaration.***—Where a default has been taken and the declaration is found to be defective and such defect is made a ground for setting aside the default, the court will set it

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aside and give the plaintiff leave to amend; but where the defect consists in the omission to state a conceded fact and the defendant has had an opportunity to obtain a ruling as to its sufficiency in the court below and failed to do so, the Appellate Court will not consider the objection.

Assumpsit, on a policy of insurance. Appeal from the Circuit Court of Christian County; the Hon. JACOB FOKE, Judge, presiding. Heard in this court at the November term, 1895. Affirmed. Opinion filed May 16, 1896.

CONKLING & GROUT, attorneys for appellant.

J. C. McQUIGG, attorney for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The action below was assumpsit upon a policy issued by the appellant company insuring the life of Bridget Bergen for the benefit of her husband, the appellee.

The policy was issued September 17, 1894, and the assured died October 24th in the same year.

The action was commenced February 9, 1895, and judgment in the sum of \$333.33 was rendered against the company by default August 7, 1895.

Two days thereafter the appellant company entered its motion, supported by the affidavit of Mr. Grout, one of its attorneys, asking the court to set aside the default and open the judgment for defense.

The court held it did not appear from the affidavit the company was free from negligence in the matter of presenting a defense and avoiding a default, or that it had any defense to the merits of the action, and overruled the motion.

The company appealed and assigned as for error the ruling of the court upon the motion and also that the declaration is insufficient to support the judgment.

It appeared from the affidavit the company, by arrangement with one only of the members of a firm of attorneys in Sangamon county, employed the firm to defend the suit and that the partner with whom such arrangements was made neglected to notify his copartner of the employ-

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ment of the firm, and being unwell, went to Michigan for the benefit of his health some weeks before the default was entered and was at a health resort at the time the default was allowed and the judgment rendered. The general rule that the negligence of the attorney is the negligence of the client is here applicable, and the Circuit Court was fully warranted in enforcing it unless it clearly appeared the default and judgment worked gross injustice to the company. That wrong and injustice would result was attempted to be shown by the affidavit. The allegations of the affidavit in this respect are as follows:

“Affiant says he is informed and believes the defendant has a good defense to all of said claim except \$166.67, and that Bridget Bergen died of a pulmonary disease, to wit, pneumonia, within one year from the issue of the policy, and by its terms only this amount is due. Affiant says the proof failed as to the death of the deceased to show the above cause of death.”

The policy sued upon contains a clause as follows: “If the assured die of any pulmonary disease within one year from the date hereof, only one half the amount which would be otherwise due, will be payable.”

The declaration averred the deceased did not die of any pulmonary disease.

The affiant did not assume to have personal knowledge of the cause of death, nor were the proofs of death referred to in the affidavit attached thereto, or otherwise presented to the court; but the court was asked to accept as against the allegation of the declaration, affiant’s version of a statement made in the proofs of death. These proofs were in writing and in the possession of the defendant, and the court properly declined to consider verbal testimony as to their contents.

Moreover, we are by no means prepared to concede pneumonia should be considered to be a pulmonary disease within the meaning of those words as employed in the policy.

In common acceptation, a pulmonary disease is one which arises from an inherent or organic defect or affection of the

lungs, and it is our opinion this provision of the policy was not intended to include, and should not be construed to include pneumonia, which is but a temporary inflammation of those organs.

The objection, the declaration is not sufficient to support the judgment, can not avail to warrant reversal.

The complaint as to the declaration is, it is alleged, it contains no allegations that proofs of death were made and filed with the company in accordance with a condition of the policy set forth in the declaration.

If the declaration was, in this respect, defective, the attention of the court should have been directed to the matter in the motion to set aside the default and open the judgment.

It was proper for consideration in that connection, and had it been brought to the notice of the court, and the declaration been found defective, the court would have set aside the default and given plaintiff leave to amend the declaration.

It appeared from the affidavit presented in support of the motion to set aside the default, proof of loss had, in fact, been furnished to the company. Therefore it is manifest the defect in the declaration, if any defect there was, consisted only in the omission to state a conceded fact, and as the appellant had opportunity to obtain in the Circuit Court a ruling as to the sufficiency of the declaration, and failed to avail itself of the opportunity, we must decline to consider the objection to the declaration as sufficient to warrant a reversal of judgment. Judgment affirmed.

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